THE Compleat Lawyer;

OR,

A Treatiſe concerning Tenures and Eſtates in Lands of Inheritance for Life, and other Hereditaments, and Chattells real and Perſonal.

And how any of them may be conveyed in a Legal form by Fine, Recovery, Deed or Word, as the Caſe ſhall Require.

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K. CHARLS the I.

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The Compleat Lawyer.

OR,

A Treatiſe concerning Tenures and Eſtates in Lands of Inheritance for Life, &c.

How were the multitudes of people at the firſt divided?

Into Families, Common-wealths, and Kingdomes.

To what end?

To live godly, peaceably, and quietly together.

How is that performed?

By keeping the Law of God, which we call Religion, and by executing vertue,

and punishing vice, by which vertue and good manners do spring.

What doth best uphold and maintain these things?

The Law.

How manifold is that?

Two-fold, *viz.* The Law of Nature, and the Law written.

What is the Law written?

It is either Divine or Civil.

What doth the Civil Law work?

A defence and encouragement to the good, and a bridling and punishment to the evill.

What else doth it work?

A security to the life of man, and quiet enjoying of *Meum* and *Tuum*.

How came in Meum and Tuum?

By the Law of *Jus gentium*, whereby right and property to Lands, Tenements, goods and Chattells, are belonging to men.

How doth every Subject in England claim and hold his Lands and Goods?

By Estates in Law.

How many Estates in Law are there in Lands and Tenements?

Three, viz. Estates of Inheritance, Francktenement, and Chattells reals.

How are Estates of Inhertance divided?

Into

Into Fee Simples, and Fee Tayl.

How are Fee Simples divided?

Into Fee Simples abſolute, and Fee Simple Conditional.

What is an abſolute Fee Simple?

When Lands are given to me, and to my heires for ever.

What is a Fee Simple Conditional?

When Lands are given to me, and to my heires for ever, upon Condition I doe ſuch or ſuch a thing, &c.

How are Eſtates Tayl-divided?

Into Tayles general and ſpecial, and into Tenant in tayle after poſſibility of iſſue extinct.

What is an intayl general?

When Lands or Tenements are given to *I. S.* And to the heires of his body lawfully begotten, or to be begotten.

What is an intayl ſpecial?

When Lands or Tenements are given to a man, and to his wife, and to the heires of their two bodyes, between them lawfully begotten.

How is Tenant in tayl after poſſibility of iſſue extinct?

When Lands are given to a man and his wife, and to the heires of their two bodyes between them lawfully begotten,

if the man or wife die without iſſue between them, the Survivor is Tenant in tayl after poſſibility, &c.

Is ſuch a Tenant puniſhable of waſt or no?

No, he is not puniſhable of waſt, yet he may forfeit his Eſtate by granting a greater Eſtate to another than he hath himſelf.

May other Tenants in tayl forfeit their Eſtates?

No, unleſſe they commit Treaſon.

How is Francktenement divided?

Into four parts, viz. Tenant by Curteſie, tenant in Dower, tenant for his own life, and tenant for another mans life.

How are Chattells divided?

Into Real and Perſonal.

What is a Chattell real?

A term for yeares, the ward of lands, and tenant at will.

What are Chattells perſonal.

All manner of Goods, Corn, Cattell, Houſhold-ſtuff, and utenſills whatſoever.

How doth a Fee ſimple in Lands or Tenements paſſe from one to another?

It may paſſe by a Fine, or by Deed, in rayſing of a uſe upon valuable conſiderations,

tions, or by deed with Livery of ſeiſin, or by a will in writing *ſealed* ſince the Statute of Wills, or by a Deed without livery, inrolled within ſix Moneths after the date therof, by the Statute in the 34 year of H.8. and by a Reverſion in fee by Atturnement. But of things incorporate, there can be no Actual Livery, but they paſſe by grant in writing onely, or by lineal deſcent.

May Tenant in Fee Simple convey his lands and tenements from his wife and heir?

Yea that he may, to whom and by what Eſtate he will, except it be in *mortmaine*, *contra ſtatutum* in the ſeventh of *Edward* the firſt, and excepting ſuch right and Dower as his wife hath in the ſaid lands.

May he charge theſe lands?

Yes, either by a yearly Rent with Clauſe of diſtreſſe, which is called a Rent-charge, or by an Annuity, or by ſtatute, and alſo if he dye, theſe lands ſhall be aſſetts to pay his debts.

Is there no forfeiture of theſe lands?

None, except he commit felony or treaſon.

May they any way eſcheat?

Yes, if the tenant die without heire general or ſpecial, then the Lord of whom they are holden ſhall have the ſame by eſcheat.

What

What is the Law sithence the statute in such cases?

If at this day there be Lord and Tenant in fee Simple by Chivalrie and twenty pence rent, If the Tenant enfeoff a Estranger of the said land, the Estranger shall hold of the Lord by the said service and rents as the Tenant did hold, and the Feoffer or seller, shall be excluded, and be not meant at all.

What if the said Tenant maketh a Feoffment of the said land to another without expressing to whose use?

Then it shall be to the use of the Feoffer and his heires, except a valuable consideration be given for the land, then it shall be to the use of the Feoffees.

What if the Tenant sithence that statute doth enfeoff a stranger of part of the land?

Then the stranger shall hold of the Lord *per paticular Morum*, viz. the Rent shall be apportionated.

As if there be twenty Acres of Land and twenty shillings Rent, the Purchasor shall hold by three shillings Rent for three Acres.

But if there be an entire service, that cannot be apportionated, as a Horse, a hawk, &c. The Lord shall have the whole.

What

What if the purchase be of the moyetie of the whole land?

There shall be no apportionallment of the Rent, &c.

What if the Lord sithence that statute purchase parcell of the tenency?

By that purchase all the entire annual services be extinct, except it be for the profit of the Common-wealth, then it remaineth, otherwise it is extinct. For that purchase read *Bruertons* case in the sixth part, *de lo: Cooke.*

What if the Lord purchase parcell of the land where the Rents and services are apportionated.

Then the Rents and services shall be apportionated.

Put a Case thereof?

If there be Lord and Tenant of six Acres of land by six pence rent, and sute of Court, if the Lord purchase two Acres, the Rent shall be apportionated; but otherwise if the rent and services be entire, as sute of Court, homage, &c. Extinct.

What if these entire services come to the Lord of part of the land by the meer Act of God, or of the Law?

Then the intire services shall remain to the Lord.

Put

Put a Case of that?

If there be Lord and Tenant of fou
Acres of land, by a Hawk, homage, sui
of Court, and herriot, in this case, if on
of these Acres descend to the Lord, th
whole services remain.

But if the Lord had purchased the sai
Acre, or released to the Tenant the service
of the said Acre, all the services alwaies ar
extinct.

Also in this case, if the Tenant doth en-
feoff any Estranger of one of those Acres
the Feoffee shall hold the whole services.

But otherwise if the services may be ap-
portionated, as of Rent, Common, or Pro-
per, &c. And thereupon are great diversi-
ties between Rent-service and Rent-
charge.

What apportionallment is there of Rent-Charge?

Rent Charge is now at this day as Rent
service was before the statute. That if the
party that hath the Rent, purchase any
part of the land charged, the whole Rent is
extinct.

May a tenure be reserved upon a gift in tayl sithence the said statute?

Yes, look how a Tenure may be crea-
ted and reserved upo' lands and tenements
in

in fee Simple before the ſtatute, ſo it may be of lands given in the tayle ſithence the ſaid ſtatute.

What if the Donor reſerveth no ſervice upon the gift in tayl?

Then the Donee ſhall hold by ſuch ſervices as the Donor holdeth over.

How is this to be underſtood?

Where the Reverſion in fee Simple remaineth in the Donor.

What if the Reverſion be granted over?

Then the Grantee thereof ſhall hold his Reverſion of the chief Lord.

Is the King tyed by the ſtatute of Quia emptores terrarum *?*

No, the King is not Subject to that ſtatute.

Vpon what things may a tenure be reſerved?

Properly upon a Feoffement, or gift in tayl, in lands or Tenements, and of Corporate things, into which may be an Entry or manual occupation.

Of what things may no tenure be reſerved?

Vpon incorporate things, as Courts, Rents, Wayes, Piſcaries and ſuch like.

Of what things in nature muſt the tenure be?

Of

Of things which are either profitable to the Feoffer or Donor, or to the common wealth.

May the service upon the tenure be reserved to be done by an estranger?

They cannot properly be so reserved.

Can the Tenant hold his Land by two tenures?

No, one parcell of Land cannot be holden by several tenures.

What tenure and service may be reserved upon an Estate of franktenement?

Commonly upon an Estate of franktenement nothing is reserved but Rent, and to that Rent fealty is incident by proper Right.

What is Franktenement?

An estate for ones life, or for another mans life.

How doth it passe?

Either by writing, or by paroll, and upon the same generally, there must be a livery of seisin.

How many manner of Estates for life are there.

There are four, Tenant for his own life, for another Mans life, Tenant in Dower, and by Courtesie.

Have these like power as the other Tenants have? No,

No, the ſaid Tenants for life, and enants for yeares, may not grant a greater ſtate to another of the ſaid Lands, than he ath himſelf, nor may not commit waſt, or charge, nor incumber the ſaid Lands, onger than they have eſtate therein.

What doe you call waſt.

Waſt is properly any thing that is done, committed in the ſaid land to the diſheriting of the Leſſor, or of him in the everſion.

Who ſhall puniſh waſt or forfeitures?

He that is next in reverſion or remainer in the ſaid land of an Eſtate of inheriance.

By what Law?

Tenant in Dower, and Tenant by the urteſie, before the ſtatute of Glouceſter, nd the reſt by the Eſtatutes.

What call you a Reverſion or Remainer?

The eſtate that dependeth, and is to ome in poſſeſſion after theſe particular Eates ended.

How doth a Reverſion paſſe, ſithence there an be no livery of ſeiſin without licence of the erretenant?

It doth paſſe properly by deed in wriing, and Atturnement of the particu-

lar

lar Tenant, or by fine, &c.

How doth a Remainder passe?

Alwaies it beginneth with the par
cular Estate, and dependeth upon the sa
otherwise it is commonly not good,
lesse it be by devise, or will, and it must
gin when the particular Estate endeth,
else it is naught.

Put me a Case upon that point.

If a lease be made to *I. S.* of Cert
lands for life, the Remainder thereof
the right heires of *I. N.* this is a conti
gent Remainder, for if *I. S.* dye in the
of *I. N.* the Reversion thereof is void,
therwise if *I. N.* dye in the life of *I. S.*
hath an heire, then the remainder is goo

*What difference is there between a Rev
sion and Remainder?*

Great difference, The Reversion is
remnant of the Estate, that the Donor
leasor reserveth in himself, and passeth
with the particular Estate.

But the Remainder alwaies passeth w
the particular Estate at the first Creati
thereof, but being created, may passe
Reversion without the particular Esta
Also he that cometh to lands by Remai
der, cometh in as a Purchasor, and sh
not be in ward, but the other in reversi
may be in ward.

What other eſtates are there unmentioned?

There is Tenant by the ſtatute Marchant of the ſtaple, Tenant by Elegit, Tenant for years, Tenant at will, and Tenant by Sufferance.

Doth an action of waſte lye againſt theſe Tenants?

No, but only againſt tenant for years, and he is ſubject unto the like law, as Tenant for life is.

May an eſtate of Remainder depend upon an eſtate for years?

Yes, very well, and then if the Remainder be for one life or more, there muſt be livery of ſeiſin made to the Tenant for years at his firſt entrie.

If Tenant for yeares dye, who ſhall have his terme?

If he do nor grant it in his life, nor deviſe it by his will, his Executors or adminiſtrators ſhall have the ſame.

How may it paſs?

Either by writing, or by paroll, and it ſhall be aſſetts to pay the owners debts if he dye poſſeſſed thereof.

What do you call aſſetts?

There is aſſetts intermains which is goods and Chattels of the Deſcedent, and there

is aſſets per diſcent, which is land in fe Simple, and both theſe ſhall be lyable t pay debts ſo far as they will goe.

What do you mean by Deviſe or Will?

When Lands, Goods, and Chattels, a deviſed or given by the laſt will and teſt ment of any.

May Lands be ſo given without licence?

Yes they may, ſithence the Statute wills, 32 *H.* 8.

How was the Law before that Statute?

No man before that Statute could gi Lands or Tenements by his Will in wr ting, to make an Eſtate of frank tenemen or upwards, unleſſe the ſame were in uſ viz. in the hands of the Feoffees.

How is the Law ſithence that ſtatute?

Sithence that Statute a man may devi all his lands in ſoccage, and two parts his lands holden in Knights ſervice.

Why may he not deviſe the other thi part?

Becauſe it ought to deſcend, that th lord be not defrauded of his Tenure, vi Ward, Marriage, &c.

How be Wills made?

Either in writing, or elſe witho writing, and then it is a Nuncupative Wil but no Eſtate in Lands for life, or upward

wil

will paſs by a Will Nuncupative, which is without writing.

What general learning is elſe of wills?

The laſt Will is alwayes of force, *Quia voluntas eſt ambulatoria & non conſummatur uſque ad mortem Teſtatoris*, and then the intent of the deviſor ſhall be much taken therein, as far as the words will extend.

What do you mean by the words uſe?

I diſtinguiſh it thus, That before the Statute of 27 *H.* 8. one man might have the lands, and another the uſe of the ſame lands.

What did invent thoſe uſes?

Two things, viz. fear and fraud; feare in the time of War and troubles, and fraud to defeate the Lords of the Fee, and Creditors.

How many manner of uſes are there?

Two, viz. in Eſſe, and to come in contingencie.

How in Eſſe?

Either in poſſeſſion, or reverſion, or remainder.

How in contingencie?

Uſes which may come and after be in poſſeſſion, reverſion, or remainder, if they be not cut off or barred.

What things are incident to thoſe uſes?

Confidence in the perſons enfeoffed and purity in eſtate.

Did they good or harm in common Law?

They did more harm than good, wherupon divers Statutes were enacted, as 10 *R.* 2. the 4 *H.* 4. 10 *H.* 7. the 11 *H.* 7. and 10 *R.* 3. were ordained to ſuppreſſe the miſchiefs that uſes brought in.

Were thoſe miſchiefes Remedyed by thoſe Statutes?

No, they were not, untill the Statute of 27 *H.* 8. by which Statute uſes were transferred into poſſeſſion, ſo that now upon creating of an uſe, it is preſently turned into poſſeſſion, and the Feoffees are but condit pipes to lead the uſes.

How was it before that ſtatute?

Before that ſtatute, he that had the poſſeſſion, viz. the Feoffees might ſell the land from *Ceſtui que uſe*, and he had but his remedy, in the Chancery.

Are there any uſes now in law?

Yes, but they are transferred *ipſo facto* into poſſeſſion, and hereupon the Feoffee is excluded.

Why are they uſed?

Properly to eſtate wives, for the Huſband cannot enfeoffe or grant Immediately to his wife, becauſe they are but one perſon in the law.

How

How muſt ſuch an eſtate be made?

The Husband muſt enfeoff two or three to the uſe of his wife for life, or otherwiſe.

Why muſt hee infeoff two at the leaſt?

Otherwiſe one Feoffee hath ſuch an eſtate thereby, that his wife cannot have her Dower.

May not the Subject hold lands of the King?

Yes, all the Lands of England are holden either mediately or immediately from the King as Lord Paramount.

How may they be holden of the King?

By Knights ſervice in Capite, by ſoccage in Capite, by Knights ſervice won in Capite, by Soccage won in Capite, by Grand Serjeanty, and by petty Serjeanty.

What Difference is there in theſe Tenures?

Many great Differences. All lands holden in Capite in Chivalry, do draw VVard, Marriage, and Relief, viz. a Knights Fee is five pound, and ſo ratably, and it cauſeth all other lands holden of meaſne Lords to be in ward. Alſo the tenant cannot grant theſe lands for life, or for any other higher Eſtate without

licenſe of the King, nor his wife canno marry without licenſe, and if they do they ſhall anſwer the King meaſne pro fits. And if a Tenant enter, and ſei without licenſe, he muſt pay for his li cenſe one yeares profit thereof. But t have a licenſe before he enter, and ſei is but the third part of one yeares profi Alſo the heire having been in ward when he commeth to full age, mu ſue livery, which will coſt him on yeares profit. And if he be at full Ag at the death of his Anceſtor, then he mu have a primer ſeiſin, which is of lik charge.

What if it bee holden in ſoccage in Ca pite ?

That draweth not ward, &c. no any other lands, and the Relief is on yeares Rent, but the tenant muſt ſue hi livery or primer ſeiſin of thoſe land onely.

What of Lands in Knights ſervic onely ?

That draweth onely ward, Marriage and relief, only for that land, in caſe of a common perſon, but that the King muſt have his prerogative without Priority o poſteriority.

Q. What

What do you mean by priority?

That if a common perſon holdeth ſeverall lands of two Lords by Knights ſervice, the eldeſt tenure, viz. he that made the firſt Feoffment, which is not ſo in the Kings caſe.

How may one otherwiſe hold of the King?

He may hold by grand Serjeanty, and by petty Serjeanty.

How do they differ?

Grant Serjeanty is Knights ſervice and more, for the relief thereof is the value of the land by year, and petty Serjeanty is ſoccage in nature.

Put a caſe thereof?

He that holdeth of the King to find a man to ſerve in the Warrs by forty dayes at his own coſt, holdeth by grant Serjeanty: But he that is to find a Horſe, or ſuch a thing, to ſerve as aforeſaid, that is petty ſerjeanty, becauſe it is not to be done by a mans body.

Alſo the tenant may hold of the King, or of a common perſon by Eſcuage, Homage, Anceſt. Or by homage, fealty, and ſute of Court.

What is the meaning thereof?

Put me a caſe thereof?

Eſcuage uncertain is Knights ſervice and Eſcuage certain is ſoccage. Homage Anceſtor is alwayes between the Feoffor and Feoffee and their heirs; the other Homage is ſometimes joyned to Knights ſervice, and ſometimes to ſoccage. And fealty is alwayes incident to all manner of Tenures and Eſtates.

Of what nature are theſe ſervices?

Some of them are valuable, and ſome not.

Upon what cauſe were they reſerved?

To keep a knowledge between the Lord and Tenant in lieu and recompence of the land.

What remedy is there if the Tenant doe not his ſervices?

The Lord may of Common right diſtrain for them, and if the tenant dye without heir general or ſpecial, or be attainted, the Lord ſhall have the land by Eſcheat, as having no tenant to do his ſervice. And thus much briefly of Eſtates, tenures, and ſervice.

Why hath the Lord the warde of the body and lands of the heire being not twenty one years of age?

Becauſe if the land be given to the tenant to do ſervice of Chivalry, and when

hen the Tenant dyeth, his heire be-
g within age, for that ſuch a tenant
annot doe the ſervice, the Lord will
ave the body and land untill he come
o age.

When ſhall ſuch an heir bee ſaid to be in ard?

When the Father dyeth ſeiſed of
nds holden in Knights ſervice, and his
eire being a Sonne, and within the age of
ne and twenty years, and if it be a daugh-
er, within the age of fourteen yeares, the
ord ſhall have the ward untill fixteen
ears by the ſtatute law.

*Why if the father dye ſeiſed but of a Rever-
on of the ſaid land, an eſtate for life or yeeres
hen being on foot?*

The Heir ſhall be in ward for his
ody.

*Is it ſo if the Father dye ſeiſed of a Re-
ainder?*

No, the heir there ſhall not be in ward,
the tenant for life be living.

What other differences are there?

If lands holden in Knights ſervice come
the heir by deſcent, he ſhall be in ward,
t if it come by purchaſe, he ſhall not be
ward.

Put a caſe thereof?

If

If the Father and Sonne purcha
lands, holden as aforesaid, to them, a
to the heires of the Father, and the F
ther dyeth, the Sonne within age sh
be said to be in by purchase, and not
discent, and shall not be in Ward. B
by the Statute in the 30th. of *Hen.* 8.
it be holden by the King, he shall be
Ward.

When shall the heir be said to be out ward?

If it be a Male, when he accomplishe
the age of twenty yeers; if it be a Fema
she must be full fourteen yeares at t
death of her Ancestor, otherwise the Lo
will have her Ward untill she be sixte
by the Statute.

And also, if the heire being in Wa
and within age, be made a Knight, th
he shall be out of Ward: But otherw
if he be made a Knight in the life of
Father.

What is the Lord to have by his Ten when he commeth to full age?

He is to have the value of his Ma
riage, if he doth not take a Wife d
ring his Nonage; and the double val
of his Marriage, if he take a wife d
ring his Nonage; and the double val

of his Marriage, if hee take a wife during his Nonage, if the Lord tender him a wife without disparagement. But note that the first tender is not material.

How shall that value be tryed?

By a Jury, sworn to try and value the same.

Shall the heir in Soccage within age be in ward?

Yes, untill he come unto the age of fourteen yeares, and then the Guardian is to account unto him for the profits of the said lands, and after the age of fourteen yeares, hee is to take the profits of his lands by his *Prochein amie*. But the Guardian in Chivalry is not so to doe, but to have the Ward of Body and Land to his owne use untill the age aforesaid.

Who ought to have the wardship of the heir in Soccag?

If his Lands doe descend unto him by the fathers side, his next Uncle or friend on the Mothers side, to whom the Land may not descend: *Et sic è converso.*

What

What is the Reliefe of Lands in Sc cage?

The value of one years Rent.

What if a man be disseised of h Lands and Tenements, or dispossessed of h Goods and Chattels, what remedy hath h in Law?

His Remedy is either to enter into th Lands and Tenements, if his Entry b congeable, as if there be no discontin ance nor descent cast; or else to brin his Action, and so to recover the same b course of the Law, upon every which Ac on there is a proper and special Wri ordained.

How many manner of Actions a there?

There be Actions real, and Actions pe sonal, and Actions mixt.

What do you call Actions real?

Some are possessory, and some are an cester, the first being where the plainti hath been seised, and is disseised, and th other where the plaintiff was never seise but some of his Ancestors, whose next he he is.

Wh

What ſhall the Plaintiff recover in real ctions?

In a real Action the Plaintiff ſhall recover the things in demand.

For whom and againſt whom doe theſe ctions lye by law?

Alwayes by, or againſt Tenant for fe.

Shall the Plantiff in theſe real ctions alwayes recover Coſts and Damma-s?

In ſome of theſe Actions he ſhall, in me not.

How ſhall he know what action doth lye perly for every demandant?

That is great Learning, and a long diſ-urſe.

Let me ſomewhat underſtand it in neral?

Firſt you muſt note that there are me Writs onely for Tenant in Fee mple, as a Writ of Right, of *Ayel*, *ſaiel*, *Cozenage*, *nuper obiit*, and ch like, as *Natura brevium* will ſhew ee.

Alſo, there are ſome VVrits one-for Tenant in tayle, and the onor, as a *Formedon in re-mainder*

remainder, diſcender, & in reverter.

The firſt for Tenant or heir in tail, t
ſecond for him in the Remainder, wh
there is no heire, and the intayled la
ought to come unto him by his Remai
der.

And for the Donor, when both the oth
doe fail, and for want of heir or remainde
the land ought to revert or come back
the Donor.

And ſome other writs do lye for Tena
for life, againſt Tenant for terme of li
and the writ of *Novell Diſſeiſin*, and all t
writs of Entrie in degree as the caſe lye
viz. that the writ of Entrie *ſur diſſeiſ*
the writ of Entrie in the *Per*, *Cui*, a
Poſt, and in all theſe dammages are to
recovered, and not commonly in the fo
mer.

How are theſe and the former to b
tryed?

The writ of Right being the higheſt wr
in Nature, lyeth where all the reſt fai
and is to be tryed by battel and grand A
ſiſe; and the iſſue is by joyning the mi
upon the meer Right, and the reſt are
be tryed by verdict of twelve men, un
which the parties may have their d
Challenge.

Wh

What is the nature of actions perſonals?

It is for the moſt part to recover Coſts nd dammages for the thing in demand, nd are to be tryed by verdict as afore-aid.

Recite ſome of theſe writs for actions per-ſonal?

There are many, as a writ of treſpaſſe, of ebt, Accompt, Deceipt, Detynue, Cove-ant, &c. *vide Natura brevium.*

How elſe doe the real and perſonal actions iffer.

In Real actions, the land muſt be ſum-oned and the view taken. But in perſo-al Actions, the perſon of the Defendant uſt be ſummoned.

What are Actions mixt?

They are part in realty, and part in per-onalty.

Recite one thereof?

There is the Action of waſte, in which he place waſted ſhall be recovered, and reble damages.

How and by whom are theſe tryalls to be executed in Law?

They are executed two wayes, either by udges, *which ought to be twelve*, or by Ju-ors *lay men*, which ought to be twelve and ree-holders.

When

When by the Judges?

VVhen the Councel in Law of both sides do demurre in law, that is, reſteth upon a meer point in Law, that ſhall be tryed by Judges.

When by a Jury?

VVhen the ſaid Lawyers joyne upon an iſſue in fait which muſt be tryed *juxta probatum & allegatum, viz.* by evidence and witneſſes.

Where ſhall the tryal in fait be?

In that Country where the Jurors may take beſt notice of the matter; *nam ibi ſemper debet fieri triatio ubi Juratores Meliores poſſunt habere notitiam.*

How is that meant?

As when one is robbed in one County and the goods are found in another County, or wounded in one County and dyeth in another County, ſometimes the Counties ſhall joyn together if they may.

You have reaſonably ſatisfied mee in this matter, perceiving thereby that the law is the life and ſinewes of every Common-wealth. But what doth your law conſiſt of?

It conſiſteth of a poſitive law, of cuſtome, and of ſtatute.

Wha

What do you call the positive Law?

That which was the first Law, before Customes or Statutes did alter the same.

Shew me some example of your positive Law?

There is a positive Law in England, that descent doth toll an Entry; that between some Tenants the survivor shall have the whole, if no Act be made to the contrary; that the eldest sonne shall inherit, and all the daughters by equal portions. *Et sic de cæteris.*

What do you call Custom?

Custom may be in free land or in Copyhold land.

How in the one and how in the other?

By the Custom in certain Burroughs which is called Burrough English, the youngest son shall inherit. And in Gavelkind all the sonnes, *& sic de cæteris.*

And in Copyhold Land the words *sibi et suis* do create an estate of Inheritance, and the wife of a Copyholder that dyeth seised of his Copyhold Lands shall have her free Bench during her Widdowhood.

How are these customs maintained?

The life of a Cuſtome is uſe and con tinuance, ſo that it be not altogether a gainſt reaſon.

What do you call your Statutes?

Acts and Lawes, which are eſta bliſhed by Act of Parliament, *by th King, the aſſent of the Lords Spiritual an Temporal, and the Commons of th Realm.*

To what end are they made?

They are made generally either to a bridge the power of the Common-law, o elſe to enlarge the ſame.

Was the Common-law defective befor theſe Statutes?

No, not altogether defective, bu the Law hath been by great wiſdome al tered, or at leaſt increaſed, or abridged according to the offences of the Subject growing and increaſing from time t time.

Shew me ſome examples thereof?

At the Common-law, the coun terfeiting of the Great Seale of thi Realm was Felony, and now by Statute i is Treaſon. So the cutting of a purſe wa but Treſpaſſe, and afterwards the loſing o his thumb, and now Felony; and ſo of di vers other things.

Hav

Have theſe Statute-laws amended or paired the Common law?

VVhere it hath not altered the poſitive Law, but hath only increaſed or decreaſed the puniſhment thereof, it hath done great good, but where it hath altered the Common Law in ſubſtance, it hath done great harm.

Shew me an example where a Statute hath altered the Common law?

Amongſt others, I will ſpeak onely of the Statute of *VVeſtmin.* the ſecond, of *Entailes?*

Did that Statute good or harm?

In my opinion much more harme than good to the Common-wealth and Subjects.

Shew me ſome of the conveniences, and inconveniences?

The firſt cauſe of that Statute was to continue lands in the iſſue in tayl, or in him in remainder *ſecundum voluntatem Donatoris*, which now may be cut off by fine and recovery.

Secondly, if the Father dye farre in debt, theſe lands will not be lyable to pay his debts, and thus ſometimes the Creditor is undone, and many times defrauded.

Thirdly, no man can take any good Eſtate from the Tenant in Tayl contrary to the ſtatute of 2 *H.*8. But he muſt be at the charges of a fine and Recovery, whereby the eſtates of poor men are defeated.

Fourthly, if the Father commit felony, the ſonne ſhall have the Lands, which is an encouragement to evill.

All which as it ſtandeth, in my opinion, hath brought more harm than good, as Purchaſors defeated, Leaſes evicted, Eſtates and grants upon good conſiderations avoyded, Creditors defrauded, offendors emboldened, and divers other inconveniences.

I underſtand this, and the Law in the ſame ſort in the reſt. But how may eſtates in tayl be cut off contra voluntatem Donatoris, *and I will trouble them no more?*

Alwaies the donee in tayl in poſſeſſion, by a gift in tayl by his Anceſtor, by a fine duly executed may cut off that intayl, and conclude parties and parties, viz. thoſe who are parties to the ſame fine and their heirs.

If it be with Remainder over to perſons named in the deed, then there needeth a fine with Recovery to make it ſure

ſure, yet the fine is good as long as the firſt Donee hath iſſue living; and doth bind him in the remainder, if he maketh not his claim within five years after his Title accrued.

But by a Recovery with a fine it is barred preſently after the perfecting.

How muſt this fine and recovery be ſued out?

Firſt, there muſt be a Recognition of the Sellor, which is the Conizor, by *Dedimus poteſtatem*, or in the Common Pleas before the Judges, to the Buyer called the Cognizee, of the nature and quantity of the land, and then finiſhed accordingly to make him Tenant of the land. Then take a *Præcipe quod reddat*, or a Writ of *Entry* in the *Poſt* muſt be brought by two ſtrangers againſt the ſaid Tenant, and he muſt vouch the Conizor, *viz.* the Tenant in tail, and he muſt appear by Atturney or in perſon, and vouch the common voucher, and ſo the Tenant to hold in quiet poſſeſſion, and the Conizor, or Tenant in tail to recover over ſo much land, and this recovery over (ſo purſued) is the reaſon of the Law, and called the double Recovery.

What is the ſingle Recovery?

Such a Præcipe or VVrit of Entry in the *Poſt* muſt bee brought againſt the Tenant in tayle, and hee muſt vouch the common vouchee, which muſt appear as aforeſaid, and confeſſe the VVarranty.

VVhy is this not ſo good as the other?

Becauſe it behoveth there the tenant in tayle to bee ſeiſed of the ſtate tayle at the time of the Recovery; for if hee be ſeiſed of any other eſtate at the time of the Recovery; as if he firſt diſcontinue the tayle, and ſo be ſeiſed of a Fee Simple at the time of the Recovery, then the Recovery is void.

Alſo a Collaterall warranty from the Anceſtor of the Tenant in tayle, which Anceſtor dying without iſſue, and the ſaid VVarranty deſcending upon the ſaid iſſue in tayle, is a bar alſo of the tayle, if hee make not his claime in the life of his ſaid Anceſtor.

If the Remainder aforeſaid bee in the King, ſhall the King be barred as aforeſaid?

This was ſomewhat doubtfull before the Statute of 34 and 35 *Hen.* 8. But ſithence that Statute it is no diſcontinuance

nuance of the tayle, nor bar to the Tenant in tayle, nor to the King in Remainder; yet the Law maketh a difference at this day, if the King give lands in tayle, with the Remainder or Reverſion in the King, a Fine or Recovery will not bar that entayle.

But if a common perſon give lands in tayle without a Reverſion or Remainder in the King, that entayle may be cut off by a Fine and Recovery. And ſo the difference is, when the gift is from the King, and when from a mean perſon. And thus much generally of entayled lands.

I pray you put me ſome more difference between the Prerogative and grant of the King, and of a mean perſon; and firſt touching his perſon?

Firſt the Kings Majeſty hath two bodyes, *viz.* a Natural and a Politique body.

Where, and when hath he a Politique body?

For three cauſes, *viz. Cauſa Majeſtatis, neceſſitatis, & utilitatis.*

In the firſt hee cannot give, nor take, nor grant but by matter of Record.

Secondly, to avoid *inter-Regnum* and Nonage, &c. That body cannot dye.

Thirdly, to take lands by deſcent, and in that caſe the half blood cannot hurt. *Vide Cook, Calvins* caſe.

What is the meaning of all this?

That the King or Queen of *England* in their politique bodies cannot be diſabled, as by death, Nonage, Marriage, or any ſuch like, as a common perſon may be.

What of his natural body?

He may have Lands by deſcent, and purchaſe as a common perſon may do by way of Remainder or matter of Record.

What is his Prerogative in grants made unto him, and in grants made by him?

It is a ground in Law, *quod nemo poteſt plus juris ad alium transferre quam in ipſo eſt.* And further, nothing can paſſe from the King, nor for the moſt part to the King, but by matter of Record, *viz.* by Letters Patents under the great Seal, and that the King cannot paſſe any thing by livery of ſeiſin, nor by matter in fait, nor cannot diſſeiſe, nor be diſſeiſed.

Alſo it is a Maxim in Law, *quod nullum*

m tempus occurrit Regi, that there ſhall e no Laches nor Eſtopples in the King r any Right or Title contrary to his exreſſe grant.

Then it ſeemeth that grants made from the ing ſhall be taken ſtrictly?

Yes, the King muſt not be deceived in is grant, and the thing muſt be named, nd expreſſely ſet down; for things not amed will not paſſe by this word Appurenances, and the grant ſhall not be taken rictly againſt the King, nor largeſt for he Grantee, as in a common Perſons aſe. 1.H.4.6.

What things in a common perſons caſe will aſſe by this word Appurtenances?

An Advowſon appendant, common apendant, or appurtenant, and by reaſon of icinage, wayes, and ſuch like.

What things may paſſe by the grant of another thing, as incident thereunto?

Many things may paſſe by the grant of nother thing without ſpecial naming of he ſame.

As a Rent by the grant of the Reverſion. By grant of a Mannor, the Hundred Court r Leet, and the ſervices. By grant of a air, the Court of Pypowder, and many hings elſe in the ſame nature.

Which

VVhich be things corporate and incorporate?

Things corporate are whereof there may be an Actual poſſeſſion, and entry thereunto, as of a Mannor, a houſe, lands, tenements, and ſuch like.

VVhich be things incorporate?

Things incorporate are rents, Court Services, Common, and ſuch like, and theſe may be appendent, appurtenant, belonging to corporate things, as land and ſuch like.

VVhat do you call common?

It is the depaſturing of one mans Cattel in the Lands of another man, in which the commoner hath no Eſtate, but it is according to the nature of the common claimed.

How many ſorts of commons are there?

Foure, Common Appendent, Appurtenant, In groſſe, and by Reaſon of vicinage.

How doe they differ?

Many wayes, Common appendent and by reaſon of Vicinage cannot be but by Preſcription, time out of mind, but the other two may begin at this day.

Alſo Common appendent belongeth proper

properly to arable land, or to meadow, or paſture that was anciently arrable land, and it muſt be uſed with ſuch Cattel as are levant and couchant upon the ſame lands, viz. the ſame both in Summer and Winter, and with ſuch Cattel as may hide and gain the lands, viz. ear and muck the ſaid lands, and not with Hogges, Goates or Geeſe.

But if the Commoner purchaſe any part of that land, or the tenant ſell any part thereof, the common ſhall be apportioned: But if the commoner buy all the ſaid lands by an equal eſtate, with the commoner, the common is drowned, and common appendent cannot be ſevered or granted from the land, otherwiſe of appurtenant. But if the commoner appurtenant purchaſe any part of that land, the whole common is extinct, becauſe it is againſt common right, and common appurtenant may belong to any, and for all manner of Cattel *ſans nombre*, ſo as the uſage and claim of either of theſe commons ſheweth and declareth what manner of common that is.

Common in groſſe may be by grant or preſcription to have common in another

ther mans Lands with twelve Oxen, twelve kine, or leſſe, to a certain number; and that may be granted over to another.

Common by Reaſon of Vicinage when two Seignories or Lordſhips and the Tenants thereof have uſed time out of mind to common together their commons or fields in the fallow or common time, by reaſon of their adjoyning, and want of incloſure, and this common is of the nature as common appendant, and the one Seignory or Lordſhip may incloſe from the other, and drive or keep the ones Cattel out of the others Seignory or Lordſhip but the one may not ſtaff-drive the Cattel into the others Seignory or Townſhip, and the one cannot have an action of treſpaſſe againſt the other, if the ones Cattel wander or voluntarily go and depaſture the others Seignory or Lordſhip.

Quære if the one may incloſe part of their ſaid Lands from the other, and leave part thereof for common; *vide Tyrinhams* caſe in *Cook*. Alſo none of theſe commoners can have an action of Treſpaſſe againſt an eſtranger which ſhall

all do treſpaſſe there, nor] is to take s common otherwiſe than with the outh of his cattel! *Quare* if the Comoner may trench the ground to looſe at the water that hurteth the ſaid Land, at. 12 *H.* 8.

Make me I pray you better to underſtand briefly what Tenant in Dower is?

Dower is ſuch an Eſtate for the third ot during the wifes life, in all ſuch lands d tenements, as her husband was at any me ſeized of an eſtate of inheritance duing the coverture.

Is the wife to have a third during her life f all ſuch Lands and Tenements?

No, he muſt be ſole ſeized thereof, and ot in joynt tenancy.

Secondly, he muſt have the Francktenement, and the inheritance of the ſaid land the ſaid Barony, *ſimul & ſemel* during e Coverture.

And thirdly, he muſt be ſeized of ſuch Eſtate in the Coverture, that the hild that he ſhall beget of the ſaid Wife, may by poſſibility inherit the ſaid nds.

Of what age ought ſuch a wife to be at the eath of her husband?

Of the age of nine years.

May

May the Husband by his act any way b the wife of her Dower?

Yes, in committing of Treason, b not of Felony, by the Statute in t first of *E.* 6. by laches, entry, sute, a pleading.

May Tenants in Dower forfeit the estate?

Yes, divers wayes, as other Tenan for life may, and also by elopment fro her husband in his life without reconc liation.

May the wife of him that holdeth lands the King in Capite bee endowed by the he or any other common person?

No, she ought to come into the *Cha cery*, and there make an oath, that she wi not marry without the Kings licens whereupon a VVrit shall be directed t the Escheator to endow her.

May the wife have Dower, and also Joyn ture of her husbands lands?

No, unlesse it be in especia cases.

VVhen may the wife be at her election?

If the Joynture bee made durin the Coverture, then at the decease of he Husband, she may chuse the one, or th other, but if it be made before th

Cover-

Coverture, then ſhe muſt bee tyed to her Joynture only.

VVas it ſo at the common law?

No, but is now ſo by the ſtatute of 27 *H.7. vide Vernons* caſe in the fourth part of the Lord *Cookes* Reports.

Is Tenant in Dower puniſhable of waſte?

Tenant in Dower and by the curteſie were puniſhable of waſt by the common Law, and the other particular Tenant by the ſtatute of *Marlebridge.*

How many ages of women are there to be obſerved in law?

Eight, Firſt ſeaven years in ayde *pur fill marrier.* Next nine years to be endowed of her Husband, if her Husband be ſeaven yeares of age or upwards at his death, ten years upon raviſhment, twelve to conſent to marriage, full fourteen to be free from ward untill the age of ſixteen, ſeaventeen to be an Executor, twenty and one to doe all acts.

VVhat doe you call Tenant by the courteſie?

It is when the Husband after the death of his wife, is to have an eſtate for life in the lands of the wife, and whereof ſhe died ſeiſed of an Eſtate of Inheritance.

What

What Eſtate ought the wife to have in t ſaid Lands whereof the husband may be T nant by the curteſie?

She ought to have ſuch an eſtate as t husband is to have by whom ſhe claime Dower as aforeſaid. And beſides the wi muſt thereof have a poſſeſſion in fait, an not onely in Law, except it be of an A vowſon, or of a Rent, but otherwiſe Dower.

What elſe is requiſite to make him Tena by the curteſie?

He muſt have a child by his Wi during the Coverture, that is born live.

May he forfeit his Eſtate?

Yes, as Tenant in Dower may.

May his wife hurt his eſtate, or poſſibili of Eſtate?

Yes, if the wife commit felony befo he is intituled to be Tenant by the Curte ſie, viz. having no iſſue, he ſhall not Tenant by the Curteſie, but otherwiſe ter iſſue.

What other particular Eſtates there?

There is tenant by elegit, ſtatute Me chant of the ſtaple.

What is tenant by Elegit?

It is the Creditor or debtee that hath the moyety of all the lands of the debtor delivered unto him by way of Extent, with all the goods of the ſaid debtor untill the debt be levyed by the ſtatute of *Weſtm.* The ſecond.

What is Tenant by ſtatute or Recognizance?

It is ſuch a creditor which hath all the lands and tenements of the debtor delivered unto him by Extent, untill the ſaid debts be paid by the yearly value thereof.

What if the land extended grow better and of more yearly profit?

Then the debtor may have an *Audita querela*, and thereupon ſhorten the Extent and time of payment.

What if the Cognizee purchaſe part of the ſaid land?

If the Cognizee purchaſe any part of the ſaid land after the execution and extent, the whole is diſcharged; But if it be before the execution, and after the ſtatute acknowledged, it is a diſcharge for the other Feoffees of the ſaid land. And alſo if the Cognizor repurchaſe the ſaid land of the Cognizee, an extent may be ſued thereof.

What if divers ſtrangers be ſeverally en-

feoffed of the ſaid Land, and an extent be ſued againſt one onely?

He ſhall have an *Audita querela* to have contribution of the reſt. But if the Conizor reſerve any part upon ſuch Feoffement, and an extent be ſued only againſt him, he ſhall have a Contribution. *Quare* if his heir ſhall have Contribution.

What difference is there between theſe Statutes and an Obligation?

Theſe Statutes bind the land from the time of the acknowledgement, and maketh it liable in whoſe hands ſoever it be to pay the Debts. But the Obligation bindeth not the lands nor goods but from the time of the Judgement.

Doth a writ of waſte lye againſt ſuch a Tenant?

No Action of waſte lyeth againſt ſuch Tenant, but an Action of accompt.

Beſides theſe grounds of Law, and matters before rehearſed, what is the general learning of making and diſſolving of Contracts?

Firſt, it is a general learning, that there muſt be in every Contract *quid pro quo, viz.* Some valuable conſideration between the parties to be payed or performe

formed, either presently, or at a day to come, or else some earnest to be given presently, otherwise the Contract is void; for *ex nudo pacto non oritur actio*. And some doubt whether a consideration past, do make a contract good. Another learning is, that in an Action of Trespasse, *quod actio personalis moritur cum persona*, and the heir or executor shall not be charged therewith.

You have reasonably satisfied me in general concerning grants to men, and from men; Now shew me a little how such Contracts and grants may be discharged and avoyded by the Law by parties consent, and I will make an end?

First, it is a general ground, *Quod nihil est tam conveniens naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatur.*

What do you mean by that?

As there are matters of Record, and in fait, and some matters in fait by writing, and sometime by paroll, the matter of Record generally must be defeated by the like matter, and the matter in writing by matter in writing, and not by paroll, except it be in few cases.

Put me a case thereof?

If I enter into a Bond to pay ſix pounds at a day, I may plead Payment thereof by paroll and witneſſes, but otherwiſe of a Bond without condition.

Alſo every leaſe or eſtate of Franktenement or for years, may be drowned by taking an higher eſtate in the ſame land at any time after. Alſo theſe leſſer eſtates may be ſurrendred into greater Eſtates, and the leſſer ſo drowned.

Put me a caſe thereof?

A leaſe is made to one for life, the Remainder to another for life, the Remainder to the third in tayl, if he that hath the firſt eſtate for life ſurrender to him in tayl, or in fee, the ſurrender is voyd, becauſe of the mean Eſtate for life.

How by Releaſes?

There it behoveth that he that releaſeth hath an Eſtate in *Eſſe* at the time of the Releaſe made, and that he to whom the Releaſe is made, hath a Franktenement in the land, or in fait.

Somewhat let me underſtand the nature of Tythes, and what you call them?

It is commonly the tenth part of the yearly profits which the lay man pays to the ſpiritual man out of his Lands, Tenements, and Hereditaments.

How

How many manner of Tythes are there?

Three, viz. temporal, predial, and mixt.

When began these Tythes?

Abraham gave the first Tythes to *Melchisedeck?*

Did Abraham *then give the tenth of his increase?*

Many doubt whether it was more or lesse.

May the spiritual man take all those tythes without delivery?

No, although they be severed the ninth from the tenth, but must be set out by the lay man, for *Melchisedeck* did not take his Tythes, but *Abraham* gave his Tythes.

What remedy had the spiritual man if the lay man would not give his tythes?

He had no remedy before the statute in 2 E. 6. but to sue for the same in the spiritual Court, for by that statute treble damage are given to the spiritual man, upon wrongfull deteyning or taking away the said Tythes.

Who may prescribe to have tythes or not to pay Tythes?

No lay man except the King, or

the Patron ought to have Tythes in their own right, or preſcribe to pay tythe. *Vide Cooke le ſecond part del Report Ca: Leveſque de Wincheſter.*

Are tythes alwayes to be payed proprio genere?

No lay man can preſcribe in *non decimando*, but in *modo decimandi*?

Of what things are tythes properly to be payd.

Out of ſuch things as do increaſe, and bring a yearly profit, as of Corn, graſſe, wood, Cattel, *Silva cedua*, wool, calves, and ſuch like.

What Tythes are to be paid in cutting down of great trees?

None at all, becauſe it is a deſtruction of the ſtock, and ſo it ſeemeth of all wood above twenty years growth.

Where are thoſe Tythes to be recovered?

If the right of Tythe be in queſtion, in the ſpiritual Court; but if the lay man preſcribe *in modo Decimandi*, then upon the libel, he is to ſue a Prohibition, alleging his manner of Tything, and ſhall be tryed at the common Law by a Jury, for the ſpiritual Court will allow no ſuch plea, but in *proprio genere.*

To

To what Spiritual man is the Lay man to pay his Tythes?

Moſt commonly to the Parſon or Vicar of the Pariſh.

What? was it alwayes ſo?

No, before the Council of *Lateran*, the Lay man might have pay'd his Tythes to any Spiritual man whatſoever that would take cure of his ſoul.

Are all payed at this day to the Parſon or Vicar of the Pariſh?

No, ſome were given out to houſes of Religion, as to Abbies, Priories, Nunneries, Chaunteries, and ſuch like.

How happeneth it that Lay men have, and enjoy Tythes, contrary to the Law?

That beganne upon Appropriations.

What mean you by that Sir?

It is a Maxim in Law, that the Fee Simple as well of Tythes, as of all other Lands and Tenements, is ſuch in ſome parſon as the fee ſimple of Tythes in the Ordinary, Patron, or Incumbent, which three rogether may grant or charge the ſaid Tythes at their pleaſures.

What mean you by that?

I mean that the Spirituality heretofore abounding in Livings, were content with the Patron for gain or favour to grant a great part of the Tythes to any Lay man.

What did they uſually grant?

Moſt commonly the Rectory or Parſonage, either in Fee ſimple, or for a long term, and for a ſmall Rent.

How was the Cure then ſerved and diſcharged?

By that means a poor Vicaridge was hatched out of a great Parſonage, which Vicar in theſe daies diſchargeth the cure, and the Lay man holdeth the reſidue of the Parſonage.

May ſuch Leaſes be made at this day?

No, divers Statutes have abridged their power in ſuch caſe, and eſpecially the Statute in 13 *Eliz.* So that they can make no good Leaſe but for three lives, or one and twenty years, according to the Statute.

Now laſtly a word or two concerning the quantity of Lands and Tenements, and their ſpecial names and tearms in Law, and of all manner of Reliefs, &c. due for the ſame, and then I ſhall fully make an end?

First

First you must note, that two Fardells of Land make a Nook of Land, and two Nooks make half a Yard of Land, and two half Yards make a Yard Land,, and four yard Lands make a Hide of Land, and four, and some say eight Hides make a Knights Fee, the Relief whereof is 5. l. and so ratably. And every Knights Living or Revenue heretofore was, or ought to have been 20. l, *per annum*. And the yearly Revenue of every Baron was, or ought to have been four hundred Marks. And the yearly Revenue of every Count or Earl 400. l. whereas the Relief of a Baron was, and is 100. Marks, of an Earl or Count 100. l. and of every Duke 800. l. So you may note, that the Knights Revenue at the first being 20. l. *per annum*, the Baron at the first was to have thirteen Knights Fees, and a quarter of a Fee. And the Earl or Count twenty Knights Fees, and the Dukes forty Knights Fees, by which proportion the Reliefs aforesaid were rated, as before is mentioned; which is the reason that Noblemen ought not to be arrested or attached by their bodies, because the Law doth presume that they have sufficient Lands and Tenements to discharge any Sute.

And

And they have these Dignities given them by the King for two purposes, *viz. ad consulend. Regi tempore pacis, & ad defendend. Regem tempore belli*; in token whereof they are adorned with a Cap of honour on their heads, and with a sword by their sides.

Also there is another relief due after the death of the Tenant that holdeth by Grand Serjeanty, and likewise after the death of the Tenant that holdeth in Soccage, whereof I have made mention before. And the Relief for lands in Soccage is due to the Lord immediately after the decease of the Tenant, of what age soever the heir is. But of the rest, when the heir hath not been in Ward, and is of full age, at the death of his Ancestor, such a Relief is due presently after the death of his said Ancestor, being Tenant of any such Lands, or of any such Estate, as before is mentioned. *Vale.*

Quicquid agas prudenter agas, & respice finem,
Lex plus laudatur quando ratione probatur.

A BRIEF TREATISE Concerning Tenants and Estates in Lands, &c.

Hereditaments and Chattells.

THe most part of all such things which the Kings Majesty or any of his Subjects doth or may enjoy, are according to the terms used in the Lawes of *England*, either Hereditaments or Chattells, we call such things Hereditaments, which are Hereditary, and in a natural body may descend from Ancestor to heir, and from heir to heir for ever, or which in a body politique may successively or otherwise have a perpetual continuance, as Honours, Messuages, Dignities, Privileges, Liberties and such like. And to some purpose maketh no matter what estate or interest the

Hereditaments Natural and Political.

the party hath which enjoyeth any ſuch thing, for although he hath therein the baſeſt or meaneſt eſtate that may be, yet the name of an hereditament in a thing enjoyed in a natural ſence remaineth, becauſe it is in his kind hereditary, and an eſtate of inheritance hath therein alwaies his beeing in ſome perſon, except by ſome accident in ſome ſpecial caſe it happen to be for a time ſuſpended, or for ever extinguiſhed, as ſhall afterwards appear. And therefore he that hath but a tearm of years in Lands, granteth his intereſt in all the hereditaments which he occupieth or enjoyeth, his intereſt in the lands is thereby granted; but yet nevertheleſſe, he that hath therein but a term for certain years, hath but a Chattell, and in regard thereof, in common ſence it loſeth the name of an hereditament of that, in the moſt uſual and proper ſence it retaineth the name of an hereditament only in ſuch perſon as hath therein an eſtate of Free-hold or inheritance. And therefore if a man ſeiſed of certain lands in Fee, and poſſeſſed alſo of other lands for a tearm of years, doth demiſe all his hereditaments, to another for certain years the lands, wherein the Leaſſor had but a term, do not paſſe thereby, no more than the

Grant the intereſt of all the hereditaments which one occupieth and enjoyeth, doth grant Chattells for years alſo.

hey ſhould paſſe in the ſame caſe if the Leaſſor had demiſed all his Tenements: nd yet in a natural ſence Lands retein he name of a Tenement and Hereditament, as well in a Termor, as it doth in him that hath therein a Free-hold or Inheritance.

Alſo every Hereditament is either { Local, Tranſitory, or, Mixt.

1. Local, as Meſſuages, which are vulgarly called houſes or lands, be they Arable, Meadow or Paſture, *&c.* Local.

2. Tranſitory, as Dignities, Privileges, Liberties, Rents, Services, and ſuch like. Tranſitory.

3. Mixt, as Honours, or Mannors, which conſiſt of Meſſuages, Lands, Services, Privileges, *&c.* Mixt.

Rectories or Parſonages when they conſiſt of things Local and Tranſitory, as Land, and Tythes, and ſuch like. But a Rectory when it conſiſts only of Tythes, (as ſome doth) is a Tranſitory Hereditament, and the obſervation of this difference is very material in matter of Conveyance, as ſhall be hereafter declared. But it ſeemeth that ſuch things, whereof no eſtate of Inheritance is,

is, or ever was in being, are not to be termed Hereditaments. Alſo if a man ſeized of Lands in Fee ſimple, granteth out of the ſame a yearly Rent, or common of paſture for life, or for years, this Rent or common (as to me ſeemeth) is not properly any Hereditament; becauſe no eſtate of inheritance is, or ever was thereof in being. But if a man ſeiſed of Fee in lands, doth by ſufficient conveyance in the Law demiſe the ſame to another for term of his life, and limiteth the remainder thereof to the right heirs of a man that is living at the time of ſuch demiſe, no eſtate of inheritance is thereof in being in any perſon whatſoever; for by the Law the eſtate of inheritance paſſeth out of the Leſſor preſently, and yet it cannot be in ſuch heir to whom it is ſo limited, untill the death of his Anceſtor; for untill his death he can have no heir, but the perſon which is likely to be his next heir, is in the mean time onely termed his heir apparent. Alſo if *I. S.* ſeiſed of a Rent in Fee, doth by ſufficient conveyance grant the ſame to another for life or for years, and after the ſame *I. S.* doth releaſe or grant the Rent unto him

him that is Tenant in Fee Simple of the land out of which it is iſſuing, and to his heirs, in which caſe the inheritance of the Rent is extinct in the Land; yet in a common and proper ſence during the ſaid eſtate for life, in the ſame, and in a natural ſence, during the ſaid eſtate for years, it retaineth the name of an Hereditament: For in both theſe caſes, an eſtate of Inheritance in the thing demiſed or granted, had once his being; albeit by matter *Ex poſt facto* in the ſaid caſe of Remainder, it remaineth in ſuſpence and abeyance for a time, and in the other caſe extinguiſhed for ever. And in that which followeth, when I ſpeak generally of things Hereditary, or Hereditaments, I mean thereby Hereditaments according to the common ſence. Chattels are ſuch things as are not Hereditary, but Teſtamentary, as moveable goods, Leaſes for years, Wardſhip of Lands and body, and ſuch like: And they are called teſtamentary, as well becauſe by the courſe of the common Law, things onely of that nature, and not Hereditaments, (as ſhall be hereafter declared) might be diſpoſed by Will and Teſtament. As alſo becauſe after the death

Diverſity.

death of ſuch Teſtator, The Law doth transferre the ſame to the Executor of his laſt Will and Teſtament for the payment of his debts and legacies; for untill a Statute made 32 *H.* 8. Hereditaments were not diſpoſeable by Will, if the Teſtator had therein any greater Eſtate than for years, except ſuch uſe as is aforeſaid, and Hereditaments that were deviſable by Will, by a ſpeciall Cuſtom, and not by the common Law. And the cauſe whereof an eſtate of Inheritance of a uſe was Teſtamentary by the Common Law, did ariſe of the ſame eſtimation which the Law then had thereof, being leſſe than of a Chattell; for a Chattell was protected by Law againſt wrongs, but ſo was not a uſe apt remedy by Law, being for the one ordained, and not for the other. But it is to be noted, that albeit other Hereditaments were not Teſtamentary by the courſe of the common Law; yet by eſpecial cuſtom in ſome Cities and Burroughs, the Lands and Tenements therein ſcituate were alwaies Teſtamentary, in regard of their own nature; as Chattels were, but *ſub modo* by a ſpecial cuſtome.

Of

Of Chattels, ſome are Real, and ſome are Perſonal: Chattells Real are properly ſuch as doe ſavour of the Realty, (*viz.*) do conſiſt of ſuch things as are in their nature Hereditary, Wardſhips of Lands, or of other Hereditaments, Leaſes, or Intereſt for yeares, or at will, derived out of any thing whereof an Eſtate of Free-hold or Inheritance hath or had a being: Chattells perſonal are goods moveable, as Goods, Plate, Money, Oxen, Kine, *&c.* And hereby it appeareth that ſome Chattels perſonal are without life, and ſome living: But it is to be obſerved yet, that living Creatures *feræ naturæ*, as Deer, Conies, Hares, and ſuch like, are not Goods or Chattells, except they are made tame. Alſo Charters or Deeds of any eſtate of Inheritance or Free-hold, albeit they be moveable, are not Chattels. Alſo Chattels Real, are either Local, Tranſitory, or mixt, in ſuch caſes as is before obſerved of Hereditaments; for albeit they are termed chattels, in regard of the feebleneſſe of their eſtates, yet the things enjoyned by force of ſuch intereſts, are for the moſt part by nature Hereditaments; and of theſe

Real, or Perſonal.

Without life or living.

Local. Tranſitory. Mixt.

differences in Chattells real, ſome pro-
fitable uſe may be made, as hereafter ſha
alſo appear. And it is to be noted, tha
ſome intereſts for years are derived nei
ther from any Inheritance or Free-hold
but onely from a mans perſon: As if a
man doth by deed create an Annuity fo
years, without limiting it to Iſſue, or
of any Land or Tenement, the ſame is
derived onely from the perſon which
granted it, who in his life time, and his
Executors or Adminiſtrators that repre-
ſent his perſon after his death, ſhall be
onely charged therewith; and therefore
as well ſuch intereſt in an Annuity, a
alſo a Wardſhip of the body of an In-
fant, which conſiſteth of a perſon, may
in a ſtrained ſence be termed perſonal.
But albeit the words *Guard. de Terr.*
in the diviſion of Poſſeſſions in the be-
ginning of Mr. *Littletons* Tenures, do
ſeem to imply, that Wardſhip of Body
is not to be reckoned in the number of
chattels Real; yet it appeareth by o-
ther expreſſe Books, that Wardſhip of
Body is no leſſe real than the Wardſhip
of Lands: And therefore ſuch implicatio
as aforeſaid, is no proof, that it is to b
reckoned in the number of chattels per-
ſonal.

ſonal, otherwiſe than in a ſtrained ſence: for things Tranſitory, or Moveable, conſiſting of any eſtate, (As Wardſhips conſiſting of a term during the minority of the Ward, or a term in an annuity, villeine, *&c.*) are not properly called chattels perſonal, but real. Furthermore, becauſe ſome things which may be enjoyed in form aforeſaid, are neither Hereditaments nor Chattels, It is therefore meet to conſider, in what general thoſe things are compriſed: And as to that it is to be obſerved, that not onely thoſe things which are neither Hereditaments nor Chattels, but alſo all Hereditaments whatſoever, in every ſuch perſon that hath therein any greater eſtate than for yeares, are vouched under the generall name of Free-hold, as in the Chapter next following it doth more at large appear.

Franctenement.

WHat is a Free-hold, and what is a Chattell, is very lively ſet forth in the beginning of *Littletons Tenures*, by the ſaid figure of diviſion of Poſſeſſions: whereby it appeareth, that

all manner of eſtates of inheritance, or f
life, (be they eſtates according to t
Common Law, or according to the c
ſtome, are compriſed in the name
Franctenement) That is to ſay, eve
of them is aptly termed a Free-ho
within Judgement of Law, is great
than any eſtate for yeares, though it
made for many thouſand yeares, in r
gard of any probable preſumption th
eſtate for Life may be more perd
rable, than ſuch eſtate for yeares: but
regard a Free-hold, which is proper
well to any eſtate of inheritance, as to
eſtate for life, in accompt of Law ha
alwaies been had in greater eſtimati
than any eſtate for yeares; and for th
onely cauſe a Term for yeares is ſubje
to a forfeiture by an *Vtlary* in a perſ
nal action for an offence, wherein t
Felo de ſe offender is *felo de ſe*, and ſuch like, b
forfeiteth no eſtate of Free-hold, (unleſſe it be
all Chat- ſome ſpecial cuſtome) is ſubject to a
tels. forfeiture of that kinde. The differen
between a Franctenement and Chatte
being ſo diſcovered as is afore-ſaid;
ſeemeth fit to proceed to the conſider
tion of Eſtates. An Eſtate is that whi
Diverſi- in Latine we call *Status*; and it ma
ties. apt

aptly be thus defined, viz. An eſtate is a permanent abode or Continuance for a time or for ever, in a thing of ſuch nature, as either is, may, or might be hereditary, as Mannors, Mills, Lands, Tenements, Rents, Services, Commons, Dignities, Liberties, Franchiſes, Priviledges, Offices, and ſuch like; but no eſtate can be proper to Chattells perſonal. And for that cauſe a gift thereof for a momentary time is of like force, as if it were given for ever. But it may be objected, that ſo it may be ſaid of a term for yeares in Lands or other Hereditaments, (that is to ſay) if ſuch a term be given or granted for an hour; it is of like force, as if it were given or granted for ever, yet ſuch term therein is properly called an eſtate. To which objection I anſwer, that although the Law be ſo in a grant of a term, which is as much to ſay, his whole intereſt in the thing, wherein he is ſo intereſſed, (viz.) his Land, and not his term therein for one hour; the Grantee ſhall enjoy it no longer than for the time ſo limitted, but otherwiſe it is of ſuch gift or grant of Chattells perſonal; but herein, a difference is to be obſerved,

The definition of an eſtate.

Difference.

ſerved, between ſuch a gift or grant of goods moveable, and a demiſe thereof; for although a grantee for yeares of things properly deviſable doth enure as a demiſe or leaſe thereof, yet ſuch grant hath not the like Operation in a thing deviſable; onely in an unproper or borrowed ſence.

And therefore, albeit a grant of goods moveable for a time, doth alter the property for ever; yet a demiſe thereof for a time ſhall onely enure as a diſpoſition of the profits thereby ariſing, during that time. As for example. If a ſtock of ſheep or kine be letten for certain yeares, the Leaſſee hath not thereby the generall property thereof, but onely a ſpecial intereſt or property therein, by force whereof he may take the profit thereof during the term; but ſuch intereſt therein is not properly an eſtate. And albeit it be vulgarly called a leaſe of ſuch Kine or ſheep, yet it is not ſo to be termed, otherwiſe than in a borrowed ſence. For if a man ſo intereſſed therein is likewiſe poſſeſſed of other Leaſes of Lands, and granteth all his Leaſes to another, his intereſt in theſe Chattells perſonal, or the profits thereof, will not paſſe thereby.

hereby. Of Eſtates, ſome are General, and ſome Particular, as hereafter appeareth. 1 General 2 Particular.

General Eſtates.

A General Eſtate is that which we tearm an Eſtate in Fee Simple, which is the greateſt and largeſt Eſtate that may be; and it is divided by *Littleton* in his firſt Chapter of his firſt Book, according to the Etymology of the words Fee Simple, which in Latine are called *Feodum ſimplex, quia feodum idem eſt quod Hæreditas, & ſimplex idem eſt quod legitimum vel purum, & ſic Feodum ſimplex idem eſt quod hæreditas legitima vel hæreditas pura*; and it received the name of a general Eſtate, not onely becauſe it was the moſt common and uſual of all other Eſtates; but alſo for that in regard of the ampleneſſe thereof, it is exempted from the number of all particular Eſtates.

But yet it is further to be obſerved, that there be three kinds of Fee Simple; The firſt a Fee Simple without any other addition. The ſecond a Fee Simple

ple determinable. The third a baſe Fe Simple.

The firſt of theſe is more general an common than any of the reſidue, and i can never periſh ſo long as the ſubſtance whereof the Eſtate ariſeth, hath any be ing. And therefore, albeit that he which is ſeiſed of ſuch Eſtate, happen t dye without heire, yet the ſame E ſtate is not extinguiſhed but by Act i Law, in ſome other degree transferr to the Lord, of whom the ſaid Land were holden by way of Eſcheat, be cauſe the Land wherein the Tenant hat ſuch Eſtate, doth ſtill continue; but if man ſeiſed in Fee of a rent charge, or ren ſeck, dyeth without heire, this Fee ſim ple, although it be of the firſt ſort, dot periſh, becauſe the rent, wherein he hath Eſtate, being tranſitory, is by ſuc dying without heire, quite ſwallowed up, and drowned in the Land out o which it did iſſue. And albeit a Fee ſim ple of this kind is ſometimes abſolute, ſometimes conditional, yet the condition thereunto annexed, doth not alter the ſame in nature or kind, but onely in the accidental quality.

Abſolute Conditional.

Secondly,

Secondly, a Fee ſimple determinable, is ſuch as may be determined by a ſpecial limitation before the efluxion of the time compriſed in the general and proper limitation.

Thirdly, a baſe Fee-ſimple is when two Fee-ſimples in one thing are in being at one time, the one being in nature more worthy than the other. In which caſe that that is the leaſt worthy, is called a baſe Fee-ſimple, becauſe it is baſe in reſpect of the other.

There is a general rule in the Law, that none can have an eſtate lively, but the Donee; which is the party to whom it is given, or the heires of his body. And it is further to be obſerved, that every eſtate of inheritance is either Fee-ſimple, or Fee-taile; of the one hath been ſufficiently ſpoken for this time: For the other, ſome further touch ſhall be given in the Chapter next following.

Every eſtate of inheritance is either fee-ſimple or fee-tayl.

Particular Eſtates.

A Particular Eſtate is ſuch as is derived from a general Eſtate by ſeparation

paration of one from the other; As if a man seised in Fee simple of Lands or Tenements, doth thereof Create by gift, or grant an Estate Tayl, or by demise, lease for life, or any estate for yeares, these are in the Donee or Leassee particular estates in possession, derived and separated from the Fee Simple in the Donor or Leasor, in reversion. Also if land be demised to *A.* and the estate Tayle limitted to *B.* these are particular estates derived *ut supra*, and separated in interest from the Fee simple in remainder given to *C.* albeit the same remainder doth depend upon those particular estates. And of particular estates, some are Created by agreement between the parties, as the particular estates before specified; and some by the Act of Law, as the state of Tenant entayle, apres possibility, d' issues extinct, Estates by the Curtesie of England, Dower and Wardship. For albeit an Estate in Dower be not compleat untill it be assigned, which oftentimes is done by assent and agreement between parties; yet becaufe the party that so assigneth the same, is compellable so to do by course of Law, that estate is also said to be onely created by Law.

Also

Alſo an eſtate at will is a kind of particular eſtate, but yet not ſuch as maketh any diviſion of th' eſtate of the Leaſor, for notwithſtanding ſuch eſtate, the Leaſor is ſeiſed of the Lands in his demeaſne, as of Fee in poſſeſſion, and not in reverſion: Alſo an eſtate at will is not ſuch a particular eſtate, whereupon remainder may depend. But of all the ſtates before mencioned many fruitfull rules and obſervacions are both generally and particularly ſo lively ſet forth by the ſaid Mr. *Littleton* in the 1.2.4. 5.6.7. and 8th. chappers of his firſt Book, which is extant aſwell in Engliſh, as in French; whereunto I refer you.

Poſſeſſion.

IT is further to be obſerved, that all eſtates that have their being are in poſſeſſion, reverſion, remainder, or in right, but of all theſe poſſeſſion is the principal, for that it is the full fruition of all the fruit of the eſtate. There are two degrees of poſſeſſion, The firſt and Chiefeſt poſſeſſion in *fait*, the other poſſeſſion in Law. Poſſeſſion in *fait* or deed is ſuch as is before ſpoken of, and that is moſt

Two degrees of poſſeſſion
1 poſſeſſion in *fait*.
2 poſſeſſion *en ley*.

moſt proper to an eſtate which is preſen
and immediate, but ſuch poſſeſſion o
immediate eſtate, if it be no greater tha
a term, doth operate and endure t
make the like poſſeſſion of the Free
hold, or Reverſion. When a man is ſai
to have a term, it is to be intended
term of yeares; when it is ſaid, a ma
to have the Fee of Lands, it is alſo to b
intended a Fee ſimple; poſſeſſion in Law
is that poſſeſſion which the Law it ſel
caſteth upon a man before any entry o
perancy or profits. As if there be a Fa
ther and Sonne; and the Father dyet
ſeiſed of Lands in Fee, and the ſame d
deſcend to his Sonne as his next heir
in this caſe before any entry, the Sonn
hath a poſſeſſion in Law. So it is alſ
for a Reveſion expectant, or a Remain
der dependant upon a particular eſtat
for Life; In which caſe, if Tenant fo
Life die, he in reverſion or remainder be
fore his entry, hath onely poſſeſſion
in Law. All manner of poſſeſſions
that are not poſſeſſions *en fait*,
are onely poſſeſſions in Law; an
it is to be obſerved, That if a ma
have a greater eſtate in Lands than fo
years, the proper phraſe of ſpeech is, th

he is thereof ſeiſed; but if for yeares onely, then he is thereof poſſeſſed; but yet nevertheleſſe, the ſubſtantive poſſeſſion is proper, as well to the one as the other.

Reverſion.

A Reverſion is properly an Eſtate which the Law reſerveth to the Donor, Grantor, Leaſſor, or ſuch like, when he doth diſpoſe a Leaſe, or other eſtate in Law, than that whereof he was ſeiſed at the time of ſuch diſpoſition. As if a man ſeiſed of Lands in Fee, doth give the ſame to another, and the heires of his body, or if he do demiſe the ſame for Life or years, in this caſe the Law reverteth the Reverſion thereof in Fee to the Donor, or Leaſſor, or his heires, becauſe he departed not with his whole eſtate, but onely with a particular eſtate, which is leſſe than his eſtate in Fee: And ſuch reverſion is ſaid to be expectant upon the particular Eſtate alſo, if he that is but a Tenant for life of land by deed or parol, giveth the ſame to *I. S.* in tayle, or for term of his life, which is a greater eſtate than he may law-

lawfully diſpoſe ; in this caſe the La
reſerveth a reverſion in Fee in ſuch Do
nor , though he were formerly but Te
nant for Life. And the reaſon thereof i
for that by ſuch unlawfull diſpoſition
which by deed or word cannot be with
out livery and ſeiſin , he doth by wron
pluck out the rightfull eſtate in Fee, tha
was thereof formerly ſeiſed in Reverſio
or Remainder , and by force thereof, by
priority of time gained in an inſtant , h
was ſeiſed of a Fee ſimple at the tim
of the execution thereof. But if a m
ſeiſed of Lands in Fee ſimple , giveth th
ſame unto *A.* and his heires untill *B.* d
dye, without heir of his body ; in thi
caſe the Law reſerveth no reverſion i
the Donor , becauſe the ſtate ſo diſpo
ſed to *A.* is a Fee ſimple ; which thoug
it be a Fee ſimple determinable , is in n
ture ſo great , as the ſtate which the Do
nor had at the time of ſuch gift , an
conſequently he departed thereby wit
all his eſtate. And thereby an apparen
difference is between a gift made to *A*
and the heires of his own body , and
gift made to him and his heires un
till *B.* dye without heire of his body
for in the one caſe the Donee hath bu
an

an eſtate taile, in the other a Fee ſimple determinable; *A.* hath a poſſeſſion of reverſion; for if *B.* dye without heire of his body, then whether *A.* be living or dead, the Land ſhall revert to the Donor. But ſuch poſſibility of Reverſion is much differing from the nature and property of a Reverſion; for he that hath but ſuch a poſſibility, hath no eſtate, nor hath he power to give his poſſibility; but in the other caſe, the Donor hath Eſtate in Fee, and therefore he hath power to diſpoſe thereof at his pleaſure.

Remainder.

A Remainder is a Remnant of an Eſtate diſpoſed to another at the time of creation of ſuch particular Eſtate whereupon it doth depend. As if *J. S.* ſeiſed of Lands in Fee, demiſeth the ſame to *B.* for Life, the Remainder to *C.* and the heires of his body, the Remainder to *D.* and his heires; In this caſe *B.* hath a particular Eſtate for Life, and the remnant of the Eſtate of the Leaſſor is then alſo diſpoſed to *C.* and *D.*

D. ut ſupra, whereby *B.* hath an eſtate for life, *C.* a remainder in tayle, and *D.* a remainder in Fee, depending in order upon the particular eſtate in poſſeſſion; and in every remainder five things are requiſite.

5. things Required in a Remainder.

1. That it depend on ſome particular eſtate.

2. That it paſſe out of the Donor, grantor, or leaſſor, at the time of Creation of the particular eſtate, whereupon it muſt depend.

3. That it veſt during the particular eſtate, or at the inſtant time of the determination thereof.

4. That when the particular Eſtate is created, there be a remnant of an eſtate left in the Donor, to be given by way of remainder.

5. That the perſon or body, to whom the remainder is limitted, be either capable at the time of the limitation thereof, or elſe *Potentia propinqua* to be thereof capable during the particular eſtate; If Lands be given to *I. S.* and his heires, the remainder for default of ſuch heir, to *I. D.* and his heires, this remainder is voyd, becauſe it doth not depend upon any particular eſtate. But if

if Lands be given to *I. D.* and his heires during the Life of *I. N.* the remainder to *I. B.* this remainder is good, for it is not limitted to depend upon a Fee-simple, but upon a particular Estate, which is only called an estate for life of *I. B.* descendable. If Lands be given to *B.* for twelve years, if *C.* do so long live, the remainder after the death of *C.* to *D.* in Fee, the remainder is voyd, for in that case it cannot passe out of the *Leor. al temps dl Creation dl perticuler estate pr. ans.* But if a lease be made to *B.* for life, the remainder to the heires of *C.* who is then living, this remainder is good upon a contingency, That if *C.* Dye in the Life of *B.* For this remainder may well passe out of the Leasor, presently in abayance, without any inconvenience, because only the inheritance is separated from the Free-hold as in abayance.

Reason.

No remainder can depend upon a Fee simple.

But upon a particular estate descendable.

Nota.

Reason.

If lands be given for life with a remainder to the right heires of *I. S.* and the Tenant for Life dieth in the life of *I. S.* This remainder is void, because it did not vest or settle either during the particular Estate, or at the time of the determination thereof; for untill *I. S.* dye, no person is thereof capable

by the name of his heires; but if lands be given to *I. S.* for term of his life, the remainder to his right heir in the ſingular number, and the heires of his body; and after *I. S.* hath iſſue a Son, and dyeth, this is a good Remainder, and the Sonne hath thereby an eſtate tayl; for although it were unpoſſible that ſuch Remainder ſhould veſt during the particular Eſtate; becauſe during his life none could be his heir; yet it might veſt at the inſtant of his death, which was at the time of his determination of the particular eſtate. Concerning a fourth thing, if a man ſeiſed of lands in Fee, granteth out of the ſame Rent or common of paſture, or ſuch like thing, (which before the Grant had no being) to *I. S.* for term of his Life, the remainder to *I. D.* in Fee, this remainder is voyd; becauſe of this thing granted, there was no remainder in the grantor to diſpoſe. And whereas ſome heretofore have been of opinion, that albeit the ſame can take no effect as a remainder, yet it ſhall take effect as another grant of a new Rent or common, *ut res magis valeat quam pereat.*

There is a Rule of Law, that all things enjoyed

enjoyed in a ſuperior degree, ſhould not paſſe under the name of a thing in an inferiour degree: and therefore if Lands be given to two perſons, and unto the heirs of one of them, or unto the husband and wife, and the heires of the husband, and he that hath the eſtate of inheritance granteth the reverſion of the ſame land to another in Fee, ſuch grant is voyd, becauſe the grantor thereof was ſeiſed in a ſuperiour degree, *viz.* in poſſeſſion, and not in reverſion, as appeareth 12°. *Edw.* 4. 12 & 13 *Edw.* 3. *Brook, Title of Grants.* And concerning the fifth and laſt thing; If a Leaſe be made of Land for term of Life, the Remainder to the Mayor and Commonalty of *D.* whereas there is no ſuch Corporation then in being, this Remainder is meerly voyd; albeit the King's Majeſty by his Letters Patents do create ſuch Corporation during the particular eſtate, at the time of ſuch grant the Remainder was voyd, becauſe then there was no ſuch body Corporate thereof capable, or in *potentia propinqua* to be created, or made capable thereof during the particular Eſtate; but the poſſibility thereof was then forain,

A maxim.

Reaſon.

and not probably intended. The like law is if a Remainder be limited to *Io:* the Sonne of *T. H.* who had then no Sonne, and afterwards during the particular eſtate, a Sonne is born, who is named *John*, yet this Remainder is voyd; for at the time of ſuch grant, it was not probably to be intended that *T. H.* ſhould have any Sonne of that name. Alſo before the diſſolution of Abbies, if a leaſe of Lands were made to *I. S.* for Life, the Remainder to one that then was a Monk, ſuch Remainder was voyd, for the cauſe before alleged, albeit he were deraigned during the particular Eſtate: but if ſuch Remainder had been limited to the firſt begotten Sonne of *I. S.* it had been good, and ſhould accordingly have veſted in ſuch ſonne afterwards born during the particular Eſtate.

Rights.

A twofold Right.

A Right in Law is either cloathed, or naked. A Right cloathed is when it is wrapped in a Poſſeſſion, Reverſion, or Remainder. A naked Right, which is alſo moſt commonly called a Right,

Right, is when the ſame is ſeparated from the poſſeſſion or remainder by diſſeiſin, diſcontinuance, or other deveſting and ſeparating of the poſſeſſion from it. As for example, if a leaſe of Land be made for life to *I. S.* the remainder to *I. D.* in Fee; in this caſe *I. S.* hath a Right cloathed with a poſſeſſion, and *I. D.* clothed with a Remainder; but if a ſtranger that hath no Right or Title, doth in the ſame caſe enter into the Land by wrong, and put *I. S.* forth of poſſeſſion, ſuch entry by wrong, is called a diſſeiſin: and therefore the poſſeſsion is moved from the right; for by reaſon thereof, the diſſeiſor is ſeiſed of the Land, and *I. D.* hath alſo the like naked right to the Remainder by ſuch diſſeiſin, is likewiſe deveſted and plucked out of him, and cannot be reveſted in him during the right of ſuch particular eſtate, unleſſe the poſſeſſion of the particular Tenant be therewith reveſted, which muſt be by his entry, or recovery by action, and by ſuch entry of the particular Tenant, or by his recovery with execution, the Remainder ſhall be reveſted as well as the particular Eſtate. Alſo there is a Right in Goods and Chattels, as well as

in Lands, Tenements, and Hereditaments, which is alſo clothed with a poſſeſsion, ſo long as the rightfull proprietor hath the ſame, but if another doth take them from him by wrong, he now hath only a naked Right to the ſame, which cannot be by him granted, for the cauſe before alleged; but yet he may releaſe his right therein to him that is thereof poſſeſſed; for the ſame reaſon it is before alleged of a releaſe of Right in Land, and if ſuch right happen to be forfeited to the King, his Highneſſe may grant the ſame by his Prerogative.

Common Recoveries.

A Common Recovery is ſuch as is ſuffered and recovered by the aſſent of both parties to the ſame of any Mannors, Lands, Tenements, Advowſons, Rents, Services, or other Hereditaments for ſuch Eſtate thereof, and to ſuch uſe or uſes as are between them agreed upon; and it is moſt commonly ſuffered by the Writ of *Entry ſur diſſeiſin in le poſt*, the nature of which Writ is ſufficiently ſet forth by Juſtice *Fitz-Herb.*

Herb. in his book of *Natura Brevium*, albeit ſometimes it hath been, and may be alſo uſed in other actions. And ſuch common recovery is uſual by ſingle, double, or treble voucher, as the cauſe doth require. And for the better underſtanding hereof, it is requiſite to obſerve the terms of Law uſed therein. The immediate party that recovereth, is called the Recoveror; and the party againſt whom the Recovery is had, is called the Recoveree; but in the proceeding therein, he that is to recover is called the Demandant, and the party againſt whom the immediate recovery is to be had, is called Tenant; for it is to be noted, that he muſt be Tenant of the Free-hold, or elſe the Recovery cannot be a good and ſufficient aſſurance in the Law. A voucher is the calling into the Court of ſome other Perſon to warrant the Land; and he that firſt voucheth (*viz.*) he that calleth another to warranty, is the Tenant, and the party vouched termed the Vouchee or Tenant by the warranty. And in a Recovery with a ſingle voucher, are included two Recoveries, *viz.* one at the ſute of the Demandant againſt the Tenant, and another at the ſute of the

Tenant againſt the Vouchee. And if it be with a double Voucher there are included in it, three Recoveries, one by the demand againſt the Tenant, one other by the Tenant againſt the Vouchee, and the third by the firſt Vouchee againſt the ſecond Vouchee. And in a Recovery with a treble Voucher, are included four Recoveries, whereof three are ſuch as are laſt mentioned, and a fourth is a Recovery by the ſecond Vouchee againſt the third; and in theſe Recoveries the Demandant hath Judgement to recover the land againſt the Tenant, and the Tenant hath likewiſe Judgment to recover in value againſt the Vouchee; and if it be with a double Voucher, the firſt Voucher hath alſo the like Judgement to recover in value againſt the ſecond; and if it be with a Treble Voucher, the ſecond Vouchee hath the like Judgement againſt the third. And the Record alſo maketh mention of the execution of the Judgement againſt the Tenant by Entry, or Writ of *Habere fac ſeiſinam* accordingly. And when ſuch Recovery is ſo executed, the uſes agreed upon, do forthwith ariſe out of the Lands, Tenements, &c. ſo recovered

d according to the mutual agreement Recoveries with single voucher.
f the parties. The ſcope of a common
ecovery, with a ſingle Voucher, is to
rre the Tenant and his heires of ſuch
ly eſtate tail which then is in him,
barre others of ſuch eſtates as they
ve in any Reverſion expectant, or re-
ainder dependant upon the ſame.
nd of all Leaſes and Incumbrances
rived out of ſuch Reverſions or Re-
ainders. The ſcope of a common Recovery with double voucher.
ecovery with a double Voucher, is
barre the firſt Voucher and his heires
every ſuch eſtate as at any time was
the ſame Voucher, or any of his An-
ſtors, whoſe heir he is of ſuch eſtate;
d all other perſons of ſuch right to
Reverſion or Remainder, as were
ereupon at any time expectant or de-
ndant; and of all Leaſes, Charges,
d Incumbrances derived out of any
ch Reverſion or Remainder, and that
ill be alſo a perpetual bar of ſuch eſtate
hereof the Tenant was then ſeiſed of
reverſion or remainder expectant, Recovery with treble voucher.
dependant upon the ſame, &c. The
ope of a common recovery with a
ble Voucher, is to make a perpetual
rre of the Eſtate of the Tenant, and of
every

every ſuch eſtate of inheritance as at a
time had been in the firſt or ſecond Vo
chee, or any of them, or either of th
Anceſtors, whoſe heires he, or they, are
ſuch eſtate, and as well of every Reverſi
thereon dependant, as alſo of all Leaſe
Eſtates, Charges, and Incumbrances de
ved out of any ſuch Reverſion or Remai
der.

The Law doth ſo protect the King
Poſſeſſions, that they cannot be diveſt
or taken from him by any feigned Reco
very, Diſſeiſin; and ſuch protection the
of doth alſo ſupport and preſerve the re
mote Reverſion and Remainder purſui
the ſame, that they cannot be deveſted
a feigned recovery, ſuffered by Tenant
tail in poſſeſſion, or by his Feoffemen
or by any diſſeiſin of the Free-hold; b
yet ſuch Recovery will be ſufficient of
particular eſtate tail, of the Recove
or Vouchee, and of ſuch Reverſion the
upon dependent, as are in *eſſe* between
eſtate and Remainder in the King, unl
the eſtate tail of the Recoveree or Vo
chee were created by Letters Patents
his Highneſſe, or of ſome of his Proge
tors, or by his, or ſome of their pro
ſion.

Fin

AS a common Recovery is an assurance of the greatest force to barre such Reversions and Remainders as are afore-said in the precedent Chapter, so to another purpose, that is to say, to Conclude strangers of their right, if they do not make their claim according to the form of the Statutes in that behalf made a Fine is before all other assurances to be preferred, and it receiveth the name of a Fine, *Quia finis finem legibus imponit.* In every fine there are two several parties, the Commissor, and the Commissee; the party levying the Fine, is called the Commissor, and he unto whom it is levyed, is called the Commissee. A fine is partly said to be levyed, when it is knowledged in the Court, or when it being knowledged elsewhere, is certified into the Court, and received to be there ingrossed and recorded. There are two sorts of Fines, one at Common Law, the other levyed and proclaimed according to the Statute. Two several statutes are chiefly to be considered in fine levyed, and proclaimed according to the form of a statute, the one of them is the statute of

1 *R.* 3. chap. 7. 4 H. 7. chap. 24. 32 H. 8. chap. 36.

1 *R.* 3. chap. 7. The other is the ſtatu of 4 H. 7. chap. 24. being in ſom thing afterwards explained by a ſtatu made in *Anno* 32 H. 8. chap. 3 The number of theſe Proclamations a four: and to be made at four ſever terms, and a fine levyed, and Procla med, in the King's Majeſties Court, b fore his Juſtices of the Common Pleas of any Lands, or Hereditaments is o deyned to be a final end, and to co clude, as well privies as ſtrangers to th ſame, except ſuch ſtrangers as are wo men Covert, perſons then being with in age, viz. the age of 21. years, i priſon, or out of this Realm, or not whole mind, at the time of ſuch fi levyed. But this exception is conditi nal, viz. that they or their heires, inhe table to the ſame Lands, &c. do take the Action or Lawfull entry according t their Right and Title, within five yea next after they be of full age of 2 years, out of Priſon, uncovert, with this Realm, and of whole mind, a the ſame Actions ſue, or their Lawfu entries take and purſue according t the Law. Concerning fines with Procl mations, five things are to be obſerve

Firſt

irſt, the time of Levying and Proclaiing the ſame. Secondly, the place here, and before whom it is to be levyed. Thirdly, of what things it be levyed. Fourthly, what ceremonies are erein to be obſerved. Fifthly, the ſeveal times are to be obſerved and conidered; Firſt, that the fine be levyed afr the feaſt of Eaſter, which was in the ear of our Lord God, 1496. For all fines vyed before that time are out of the mpaſſe of this ſtatute, 4 *H.* 7. As by e letter of the ſame ſtatute it apareth; 2. That the Proclamation muſt e made in time of the term; and therere, if any of thoſe Proclamations do ppen to be made either before the beinning or after the end of any term, or a Sunday, or other Feſtival day exmpted from the term, as on the Feaſt ay of the *Purification* of *St. Mary* the irgin, *Aſcention day*, *all Saints*, *All Souls*, r on the feaſt day of Saint *John Baptiſt*, it happen on any other day than on e Friday next after *Trinity Sunday*, nd to be recorded accordingly, then if be not holpen by the ſtatute 23 *Eliz.* ap. 3. All the Proclamations are reverble, by a Writ of error, or by Plea, as it

5 things are to be obſerved, concerning fines with proclamations.

4 H. 7.

23 *Eliz.* cap. 3.

Plow. Com. 266, 267. it appeareth in *Finches* caſe, *Plow*: co 266, 267. and then the fine will be no other nature or force, than a fine without Proclamations. And although in truth, the Proclamations were all made within the terms, according to the form of the ſtatute, yet if the Record or Records, do purport the contrary, they are reverſable by error, or avoydable by Plea if it be not holpen by the ſaid Statute for a Record is of that credit in Law, that no Averment may be admitted to the contrary.

It is to be conſidered who are privies, and who are ſtrangers to a fine; according to the Statute, there are three privities only, 1. Privity in blood only, 2. Privity in eſtate, (*tantum*) 3. Privity in Blood and Eſtate. There are three kinds of Privities, 1. in Blood *tantum*. 1. One is when a man is heir to his late Anceſtor, and yet hath nothing by deſcent from him. As for example, if a Father ſeiſed of Lands in Fee doth thereof infeoff a ſtranger and his heires, or if he by his laſt Will and Teſtament in writing, did diſpoſe the ſame, being holden in Soccage to another in Fee, and hath iſſue, and dyeth, in ſuch

uch caſe, ſuch iſſue is privy in blood, aving nothing by deſcent, 2. One other ind of privity in blood is, when omething is deſcended unto him, as eir unto his Anceſtor, and yet he laimeth the ſame by ſome other Right, nd not as heir, to ſuch Anceſtor. As for xample, if there be a Father and Sonne, nd the Sonne purchaſeth Lands of a ſtran- er in Fee, and is thereof diſſeiſed by his ather, who dieth thereof ſeiſed, and the me deſcend to his Sonne as heir, in this aſe, the Sonne is privy alſo in blood, but ot in eſtate; for although the poſſeſſion f the ſame Land came to him by deſcent s heire to his Father, yet he was therein mitted forthwith to his former Eſtate. . And a third kind of privity in blood *antum*, is where a man in ſome reſpect privy in blood and eſtate, and in ano- her reſpect privy in blood *tantum*. As or example, if there be two Brothers, nd the Eldeſt purchaſeth Lands in Fee, nd is thereof diſſeiſed by his younger rother, afterwards diſſeiſed by a ſtran- er, and that ſtranger dyeth thereof ſei- d, the younger Brother being within ge, and afterwards the Elder Brother dyeth

dyeth without iſſue, the younger Sonn hath two manner of Rights to the Land the one is a Right of Entry againſt ſuc heir as is in by deſcent during his mi nority; but that Right is onely in reſpe of his former poſſeſſion which he obta ned by diſſeiſin, and not as heir to hi brother, and in this reſpect he is priv in blood to his Eldeſt brother, but no privy in Eſtate. The other Right that i now in the younger brother, is only Right in Action, and not a Right of En try, and this is in him as heir to hi brother, whoſe entry was taken away b the ſaid deſcent, in reſpect of his Righ he is privy in blood and Eſtate to his bro ther. Privity in Eſtate *tantum*, is whe a man claimeth an Eſtate in Land, as a ſignee to another; as if *A.* infeoff *B.* i this caſe *B.* and his heires are privy i eſtate to *A.* Privity in blood and in eſtate are of two ſorts, whereof the one ma properly be called a privity of blood an eſtate, the other is ſo called unproperly and in a borrowed ſence. That which properly called a privity in blood and eſtate, is when both privities do accrew b deſcent, by or from one Anceſtor. Th other is, when the one of them accrewe

by one manner of title, and the other by title of another kind : As for example : If there be a father and a ſonne, and the father purchaſeth lands, and dyeth thereof ſeiſed, and the ſame doth deſcend to his Sonne, he is to his Father in a proper ſence privy in bloud and eſtate ; becauſe both thoſe privities doe to him accrew, by one deſcent from one Anceſtor.

It is to be noted, that ſuch privyes as the ſtatute meaneth, are after the inroſſing *de le fine & proclamation* made according to the form of the ſtatute, abſolutely barred without hope of recovery or reſtraint, by any claim ; but ſuch as are ſtrangers are barred onely conditionally, if they or their heires doe not claime according to the form of the ſtatute within the times therein preſcribed. It is a rule in Law, that no errour in the fault of the Judge can be aſſigned to reverſe a Judgment, unleſſe it be ſo apparant, that it may be tryed by view of the Record, or by inſpection of the perſon : for if it ſhould, many grave Judgments would bee overthrown by corrupt tryalls of falſe ſurmiſes to the ſubverſion of Juſtice and maintenance

of vice. But if the Judge give judgment for the one party upon the matter appearing of Record, whereas he ought to give Judgment for the other party, this is reverſable by errour, becauſe ſuch fault of the Judge through ignorance of the Law is apparent by the view of the Record. Alſo a fine levyed by a feme covert is not erroneous, and therefore it is not reverſable by error, but avoidable by her. Alſo a fine levyed by a feme covert at the common Law is avoydable by the entry of the Husband ; yet ſince a fine levyed at this day and Proclamation according to the form of the ſaid ſtatute of 4 *H.* 7. or 31 *Eliz.* Cannot be avoyded by the entry of the Husband, or the Commiſſor, as to the Eſtate of Inheritance, but onely to the Franktenement during the coverture, and ſo long afterwards as he ſhall be tenant by the curteſy, if he had iſſue by his ſaid Wife, before the fine levyed. And in that caſe albeit the Husband do enter within five years or before proclamations had and made, the Feme and her heirs are barred as privyes to the fine, the words of the ſaid ſtatute of 4 *H.* 7. be the fine to be a final end, and conclude as well

privies

privies as ſtrangers, and yet all ſtrangers ſhall not be barred by ſuch fine, the King is no ſuch ſtranger as is comprized in the ſaid act; for if the Law-makers had meant to conclude the King thereby of his Right, then it is not to be doubted (his Greatneſs being ſuch as it could not be forgotten) but they would have made ſome proviſion for his claim, which thing they have not done, becauſe they never intended to conclude him; but others, being bodyes corporate of things that go by way of ſucceſſion, are comprized in this VVord (ſtrangers) in the body of the act. And yet they are not conteyned in the letter of exception, or of any of the ſavings which do ſave rights, to men and their heires, ſpeaking nothing of corporations or ſucceſſions, or of any thing in ſucceſſion.

There be two kinds of Liveries; the one called a livery *en fait*, which is a ceremony uſed in the Execution of a Feeoffment in Fee, or a leaſe for life, by delivery of the Ring of the door of the houſe, or a clod of the land contained in the Feoffment, in the name of the houſe and other hereditaments therein

Livery twofold 1 *en fait* 2 in law.

compriſed. The other is called a Livery i
Law, or a livery within the view, with th
like ceremony in other form uſed in th
execution of ſuch Feoffment, or Lea
pur vie : but that is not alway made upo
the land, but only in the view thereo
that is to ſay, in a place where the partie
do ſee and behold the land; and the Feof
fer ſo beholding the ſame ſaith to th
Feoffee, I make livery to you of this lan
according to the purport of the Deed (
it be a Feoffment by Deed) if it be with
out Deed, then the words are to this ef
fect (*viz.*) I do deliver to you ſeiſin o
this land; or, if I do make livery and ſeiſi
of this Land to you and your heirs, or i
it bee for term of life, to you for term o
your life. This being done, the Feoffee o
Leaſſee, muſt enter, and before ſuch entr
the livery within the view is not com
pleat; for if the Feoffer happen to dy
before an entry made by the Feoffee, ſuch
livery within the view is voyd, and cannot
be good by any entry afterwards made.

Con-

Conveyances and Aſſurances by Deed poll, or by Parol.

A Conveyance or Aſſurance by Deed poll, is when it is made by a ſingle Deed which is not indented, and albeit many Conveyances may be by Indenture, which could not be good by Law, if they were made by Deed poll, or by Paroll; yet *è converſo* all Conveyances and Aſſurances that may be ſufficient by Deed poll, or by Paroll, may alſo without all queſtion be good by Indenture. Alſo what thing ſoever may be conveyed by paroll, may be alſo conveyed by Deed poll, but *è converſo*, many things may be conveyed by Deed poll, which may not be conveyed by paroll. Therefore it ſeemeth fit now to conſider what things in reſpect of their nature and kind may be conveyed by Deed poll, and not by paroll; And as touching Hereditaments tranſitory, or things tranſitory, which do paſſe properly, or ariſe by grant, not by Livery, Reverſions, and Remain-

de's expectant, or dependant upon a particular Eſtate in any Hereditaments whatſoever, may be apt Conveyance, paſſe, or be created by Deed poll, but not by paroll; and herenpon ariſeth the General Rule, that thoſe things which do lye in grant, and not in Livery, cannot paſſe by paroll, but by Deed. But ſuch things as doe lye in Livery may paſſe without Deeds; Feoffments of Meſſuages, Lands, Houſes, Mannors, or Rectories, and ſuch like, are Good without Deed; and ſo are Leaſes for years thereof made; becauſe the Freehold thereof will paſſe by Livery; otherwiſe it is of grants of Seignories in groſs Rents, Services, Commons, Advowſons, Waſts, Liberties, Franchiſes, and ſuch like, being tranſitory, or of ſuch Remainders or Reverſions as are aforeſaid. It is to be noted, that Lands, Tenements, or Hereditaments, or any eſtate therein, or any Eſtate in a thing iſſuing thereof, cannot be conveyed to the King without matter of Record, as by Fine or Recovery, Record, as by Deed inrolled, and therefore a Grant, or any other Conveyance of ſuch thing by Deed, is not ſufficient, unleſſe the

ſame

ſame deed be inrolled. And if a Leaſe of Land be made for life to *I. S.* the remainder to *I. S.* in Fee tayl, the Remainder to the King in Fee, this Remainder to his Majeſty cannot be good, unleſſe the ſame be by Deed inrolled: But a Deed poll thereof inrolled will be no leſſe ſufficient to this purpoſe than an Indenture inrolled. And to the inrolement thereof, the King is tyed to no time certain, ſo that an enrolment thereof at any time during his Majeſties life will be good in Law; but if it be not inrolled in his life-time, then nothing can thereby be in the King. And if the King grant the ſame to another before Inrolement, the grant is void, and cannot be made good by the enrolement thereof afterwards.

There are two ſorts of conveyances by Deed. The one doth enure by tranſmutation of poſſeſſion, transferring of a naked right. Conveyances by deed that do enure by way of tranſmutation of poſſeſſion, are of divers ſorts; whereof ſome do enure by way of removing of a poſſeſſion, and creating of an Eſtate, ſome by creating both of an Eſtate and poſſeſſion; ſome by extinguiſhment, ſome by ſuſpenſion hereof; and ſome by remotion of the poſſeſſion, and drowning

of the Eſtate. Conveyances by tranſmutation of a poſſeſſion, that do enure by removing both of the Eſtate and Poſſeſſion, are ſuch whereby an Eſtate and poſſeſſion formerly ſetled in the one party, are removed to the other party. Conveyances that do enure by removing of a poſſeſſion and creating of an Eſtate are ſuch, whereby a poſſeſſion formerly ſetled in one party, is removed to another by Creation of a New Eſtate other than ſuch as was in the party from whom it was derived. A Conveyance that doth enure by Creation of an Eſtate and poſſeſſion, is when the thing conveyed had no being before the making of ſuch conveyance. A conveyance by tranſferring of a poſſeſſion, is ſaid to enure by way of extinguiſhment, when the thing and the Eſtate conveyed are thereby extinguiſhed. A conveyance doth enure by remotion of the poſſeſſion, and a drowning of the Eſtate, VVhen a ſurrender is made of a particular Eſtate for life, or for years, to him that hath the Reverſion or Remainder thereof, in which caſe the poſſeſſion of the Land is removed, but the Eſtate is drowned; for hee to whom the ſurrender is made

is

not ſeiſed of the particular Eſtate, but ſuch Eſtate wherein the ſame is drown-; and ſuch ſurrender, of an Eſtate which ight have been created without deed, or atter of Record, may be ſurrendred by roll.

Note, that a ſurrender to any perſon a particular Eſtate which could not be eated without Deed, matter of Record, nnot be good by Paroll.

Conveyances by Will.

A Conveyance by Will is commonly called a deviſe, the party that gi-h or bequeathes a thing by Will is mmonly called the deviſor, and he to om it is bequeathed the deviſee ; of viſes general there be three ſorts, 1. a viſe by the Common Law, 2. a deviſe Cuſtome, 3. by force of the ſtatutes of , and 34 *H.* 8. By the Common Law no nner of Hereditaments, wherein the ſtator had any greater Eſtate than for rs (except an Eſtate in a Uſe of nds or Tenements) was deviſable Will, but he that had ſuch uſe in Fee, for another mans life, might before ſtatute, 27 *H.* 8. *de uſibus in poſſeſſio-*

nem

nem transferendis, have deviſed the ſame by VVill as he might doe of a terme in uſe. For the better diſcerning what deviſe is good by the Common Law, and what not : ſix things are meet to be obſerved : 1. That the deviſor be a perſon able to deviſe : 2. That the deviſee be capable of the thing deviſed : 3. That the things are deviſable by Law : 4 That the purport thereof being no other in effect, than ſuch as might ſtand good in Law, in a conveyance by Act executed in the life of the deviſor : 5. That the deviſe be not impoſſible : 6. That it be certain.

Concerning the firſt of theſe, forasmuch as every will doth take effect by the Death of the Teſtator, therefore without the Death of ſuch Teſtator there can be no will, and without a will there can be no deviſe, and conſequently all kinde of corporations are unable to deviſe any thing by will, becauſe they never dye. A Maior and Commonalty Provoſt and fellows of a Colledge, VVardens and Commonalty of a Company cannot deviſe any thing by VVill; no more can a Biſhop, Dean, Parſon, or Vicar deviſe any thing deviſable, which they

ave not in their politique capacity, viz.) which he hath in Right of his Biſhoprick, Deanry, Parſonage, or Vicarage, but every of them may deviſe ſuch things deviſable as they have in their Naturall capacity; for in reſpect thereof every of them muſt dye: but there are ſome naturall perſons which have no power nor ability in Law to deviſe any thing by VVill; as perſons not of whole mind and Ideots: But an infant of fourteen yeares of age may make a will, and thereby make an executor of his Goods. The Husband may deviſe Goods or Chattels to the VVife, albeit they are one perſon in Law: A VVoman covert hath no power to give any Goods by VVill, for without the conſent of her Husband, ſhe cannot by Law make a VVill, either of any of her Husbands Goods, or of ſuch Chattels in poſſeſſion, or in right of Action, as are in her Husband in his right, or her ſelf in her right: 12 *H.* 7. *Fol.* 24. A man outlawed in a perſonal Action, or a perſon attainted of felony or Treaſon, cannot deviſe any Chattels perſonall or Reall; or if it were deviſable or grantable, the property thereof is in the King, as aforeſaid,

ſaid by ſuch outlary or Attainder.

Concerning the ſecond thing to b obſerved, not only perſons of full age women ſole, and perſons of diſcretio and whole mind, but alſo Infants, feme Coverts, Ideots, and Mad-men, are cap ble of a Deviſe, becauſe it tendeth t their benefit, and not to their prejudice but yet ſuch capacity of a VVoman cover is ſubject to a condition in Law (viz. if her Husband doe not diſagree to th ſame ; for if at any time during the co verture he doth diſagree thereunto, th deviſe is void in Law, unleſs before ſuch diſagreement he did formerly agree to the ſame ; but if he do once agree to it, his diſagreement afterwards is of no Effect. Alſo perſons outlawed in a per ſonall action, or convict or attainted of Felony or Treaſon, are capable of a de viſe ; but in ſuch caſe, if the deviſe be of a chattell, the King ſhall have the thing deviſed, as a chattell forfeited by the outlawry, conviction, or attainder ; and if the deviſe be of an Eſtate in Free-hold, or Inheritance in Lands or Tenements, then in ſome caſe the King, and in ſome caſe the Lord, of whom the ſame is holden, as the caſe may require, ſhall be

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intitled thereunto : Alſo a deviſe made to a Child in his Mothers womb is good in Law.

Of the third Obſervation, for the better diſcovering what thing is deviſable by the Common Law, and what not, a difference is to be obſerved, betwixt an Eſtate to the uſe of another created by Law ; and an Eſtate made or conveyed to the uſe of another by agreement of parties ; for where it is created by Law to the uſe of another, there it is not deviſable by VVill, but if it be made or conveyed by agreement, it is otherwiſe ; as for example : If a man ſeiſed in Fee of Lands holden in Soccage, hath iſſue a Sonne and dyeth, the Son being under fourteen years of age, in this caſe the Law appointeth the care and cuſtody of ſuch iſſue, and of the ſame Lands, which came to him by deſcent from his Father, unto his Mother (if ſhe be living) as Guardian in Soccage, untill he be of the age of diſcretion, viz. 14 years ; but this wardſhip in Soccage, ſo to her accrewing by Law, is to the only uſe and profit of the Infant, and therefore it cannot be deviſable by VVill, neither ſhall it go to the Executor or Adminiſtrator of the Mother

Mother after her Death, but to the next Anceſtor of the Infant of the Mother ſide, as it appeareth, *Plowden* fol. 239. and 294. in the caſe between *Oſborne* and *Joje.*

Concerning the Fourth if *ceſtuique* uſe in Fee of Land before the ſaid Statute of 27 *H.* 8. had deviſed the ſame to *I. S.* and his Heires, and for default of ſuch Heirs to remaine to *I. D.* or if hee had deviſed the ſame to *I. S.* and his heirs, untill *I. N.* doe happen to dye without iſſue of his body, the remainder to *I. D.* and his heirs, this deviſe of ſuch Remainder had been void; becauſe by the Rules of Law, a Remainder could not be limited to depend upon an Eſtate in Fee ſimple, ſo that ſuch a Remainder could not have been created by Conveyance executed in a mans life.

Concerning the fifth Obſervation; if a man be poſſeſſed of a term determinable by his Death, doth deviſe the ſame by will to another, the deviſe is void, becauſe it is unpoſſible that it ſhould take any effect. Alſo a deviſe to *I.* the Sonne of *T. S.* of *D.* whereas the ſame of *T. S.* hath onely iſſue *W.* is voyd, becauſe there is no ſuch perſon *in rerum Natura*

So

So it is alſo, if a term bee deviſed to the Executor of *I. D.* whereas *I. D.* dyed Inteſtate.

Concerning the ſixt Obſervation, if any having iſſue many Children, doth by Will give or bequeath a Cup of Silver, Horſe, or any other thing deviſable, to one of his Sonnes, this deviſe is void, becauſe it is uncertain which of his Sonnes ſhould have it ; ſo it is alſo, if the like deviſe be made diſ-junctively to *S.* or *I. D.* but a deviſe to one of his Sonnes, at the choice of his Executors, is good, becauſe the uncertainty may be reduced to a certainty by the Election of the Executors. So alſo if a man be poſſeſſed of a terme in Lands for ſixty yeares, and by his will deviſe to *I. D.* ſuch and ſo many yeares of his ſaid term, as ſhall be nominated or appointed by his Executors, this deviſe is good, *cauſa qua ſupra* ; and yet a gift or grant thereof in that form made by conveyance, executed in his life, could not be good, the reaſon thereof is, becauſe he can have no Executors in his life time, by reaſon whereof it is impoſſible to reduce ſuch gift or Grant unto a certainty before his Death ; and a conveyance executed

in

in a mans life muſt be reduced to a certainty before his Death, or elſe it can be of no Effect in Law. But that reaſon ceaſed in a deviſe (which taketh no effect untill his Death) and therefore the Law is therein differing accordingly. Alſo it is to be obſerved, that a deviſe of Chattels may be good, either by will nuncupative, or by writing.

Concerning a Uſe, it is to be obſerved, that a man ſeiſed of Lands or Tenements in Fee, to the uſe of him and his Heires, could not by the Common Law deviſe the uſe thereof by will, unleſſe the ſame Lands or Tenements were deviſable by cuſtome. But if *I. S.* ſeiſed of certain Lands in Fee, had infeoffed certain perſons thereof to the uſe of himſelfe and his heirs; this uſe ſo ſevered from the poſſeſſion, was deviſable by the Common Law, albeit the Lands out of which it riſeth were not deviſable.

Conveyances by Will of Lands deviſable by Cuſtome.

IT is to be noted, that albeit by the Rule of the Common Law no Hereditaments

ditaments (other than a Uſe) was deviſable by Will; yet by particular Cuſtomes in divers Cities, Burroughs, Lands and Tenements therein ſcituate have alwayes been deviſable by Teſtament, ſo that the cuſtome doth therein alter courſe of the Common Law. But in every ſuch deviſe, ſix things are eſpecially to be obſerved.

1. That the thing deviſed be comprized within the Cuſtome.

2. That the deviſe be purſuant to the Cuſtome.

3. That the power of the deviſor be not reſtrained by Statute.

4. That the Cuſtome be lawfull and reaſonable.

5. That the intent of the Deviſor be certaine, lawfull, and not unpoſſible.

6 That the Will be not countermanded.

Concerning the firſt of theſe, the obſervation is double.

1. That the thing deviſed be as well in nature and kinde, as alſo in continuance, ſuch as is warranted by the cuſtome.

2. That it be contained within the

bounds and limits thereof. As to the first part, if by custome all the tenements within a certain City or Burrough be deviſable by Will; A rent charge, and rent ſeck which had continuance time out of mind, are in nature, kind, and continuance, ſuch as be compriſed within the cuſtome, and therefore are by force of ſuch cuſtome deviſable. As to the ſecond part of the obſervation; If a man ſeiſed of rent in fee, which time out of memory hath had a continuance, the ſame rent is iſſuing as well out of lands within the limits of ſuch cuſtome, as aforeſaid, as alſo out of Lands not contained within the precincts, this Rent is not deviſable by the ſaid Cuſtome, becauſe the ſame or any part thereof is not contained within the precincts thereof, which muſt be taken ſtrictly.

The ſecond Obſervation hath three branches, one concerning the perſon deviſing, another touching the perſons to whom the deviſe is made; And the third granteth the deviſe it ſelf.

1. As to the firſt branch, a deviſe made by a Forraigner, to any perſon, of Lands or Tenements ſcituate within the City of *London*,

London, is good according to the Custome of *London*, as appeareth *M.* 8. & 9 *Eliz.* fol. 255. But yet some persons comprised within the generall custome, are by the Rule of the Common Law exempt from the same, as a devise made by a Person lunatique, an Ideot, an Infant, and a man seised onely in the right of his Wife, is voyd, this custome notwithstanding.

As to the second branch; Citizens and Freemen of *London*, may by the custome of the said City, without the Kings License, lawfully devise Lands in *London*, whereof they are seised in Fee, to Guilds or Corporations, as appeareth by 5 *H.* 7. 10. 19. But if he be only a Freeman, and no Citizen, or only Citizen and no Freeman, he cannot without the Kings speciall License lawfully devise in *Mortmaine*.

As to the third branch; if the custome be, that Lands and Tenements within a certain City be devisable, in Fee tail, for such estate, *West.* 2. was a Fee simple; also it seemeth probable, that by force of a custome, that maketh Lands and Tenements devisable, a man may devise those things that are therein grow-

ing as trees, graſſe, and ſuch like. But if a deviſe of a rent, or common out of lands deviſable, is not purſuant to the cuſtom, becauſe they had no being at the time of the deviſe, and though they had any beginning, yet they were created within the time of memory, they are not deviſable for the cauſe aforeſaid. If a houſe be onely erected upon deviſable lands by cuſtome, a deviſe thereof is purſuant to the cuſtome; albeit, in that place there was never any houſe before, becauſe the houſe doth retein the nature of the land whereupon it was built, as a principal part, whereof it doth conſiſt, the change of the name notwithſtanding.

Concerning the third Obſervation, it is to be noted, that albeit the cuſtome hath been to deviſe Lands to any perſon or body politique, yet the ſame may not by force of ſuch cuſtome be deviſed at this day in *mortmaine*, upon pain of forfeiture, according to divers ſtatutes, unleſſe the licence of the King, with the conſent of the Lords mediate and immediate, be firſt therein had, and obtained; for ſuch cuſtome is in that behalf qualified, and reſtrained upon the pain

pain aforeſaid by the ſtatutes of *mort-maine*, (viz.) *Magna Charta*. A cuſtom that beganne onely ſince the ſtatute, cannot be good; for every cuſtome that may evidently appear to have his beginning ſince the time of *R.* 1. is voyd in law, as appeareth by 33 *H.* 6. 27. 9 H. 6. *et Littleton* 38. yet nevertheleſſe the cuſtomes to deviſe *mort-maine*, are not abrogated by any of the ſaid ſtatutes; for the deviſe, or other form of alienation in *mortmaine*, is not by any of the ſaid ſtatutes made voyd, but it is onely in advantage of the Lords, who might ſuſtein loſſe thereby, prohibited upon pain of ſuch forfeiture to them accrewing, as thereby appeareth; ſo that by licenſe and conſent as aforeſaid, a deviſe in *mortmaine*, by force of a cuſtom may ſtand good in Law, without danger of the penalty of forfeiture.

Concerning the fourth obſervation; if the cuſtome be not lawfull and reaſonable it is voyd; ſo that a deviſe by vertue thereof, cannot be of any force in Law. And therefore, if an alien do purchaſe and deviſe Lands lying within a

certain Borrough by force of a cuſtome, that Lands and Tenements within the ſame Borrough are deviſable to aliens in Fee to their owne uſe, and by them deviſable by Teſtament, this deviſe is void, for ſuch cuſtome againſt the Kings prerogative is unlawfull; albeit his Highneſſe cannot be thereunto entitled without office or other matter of Record, yet mean between ſuch purchaſe and office found, &c. I take the Alien to be pernour of the profits, and that the eſtate purchaſed is forthwith in conſideration of the ſame Lands, untill the Kings Title do appear by office or other matter of record. Alſo it is to be obſerved, that a cuſtom to deviſe a Right, ſeparated from the poſſeſſion, cannot be lawfull, becauſe it ſavoureth of maintenance. As touching unreaſonable cuſtoms, if the cuſtome within any City or Burrough be, that Tenements therein ſituate are deviſable by Infants, Ideots, or mad men, it is unreaſonable, and therefore void. But a cuſtome, that the ſame be deviſable by Children of fourteen years is good.

Concerning the fifth Obſervation; if the intent of the Deviſor be uncertain, unlawfull,

unlawfull, or impoſſible, the deviſe will be of no force in Law. The intent of deviſor may be uncertain, either in the perſon to whom he doth deviſe, or in the thing deviſed, or in the eſtate that ſhould paſſe thereby. And firſt concerning the perſon, it appeareth 49 *E.* 3. 3. one *Forden* did deviſe certain Tenements in *London* to one for Life, ſo that after his deceaſe the ſame ſhould remain unto 2. of the better ſort of the fraternity of *London*, this remainder was agreed to be void for want of certainty, which perſons of the fraternity ſhould have the ſame. Secondly, as concerning the certainty in the thing deviſed; as for example, if a man ſeiſed of lands or tenements deviſable, doth by will bequeath a portion thereof to *I. S.* this deviſe is void, becauſe it doth not appear, what of how great a portion thereof the Deviſee ſhould have by force of the ſaid will. 3. Albeit the intent of the deviſor doth certainly appear, and the perſons to whom the deviſe is made, and in the Lands and Tenements deviſed, yet if the Eſtate therein limitted be ſo uncertain, that neither by matter expreſſed, or implyed in the

will, nor by a common Intendement it cannot be reduced into a certainty, the deviſe will be void in law. And therefore, if a man ſeiſed of Lands deviſable as well by will nuncupative, as by writing, doth by will in writing amongſt other things bequeath the ſame to *I. S.* for ſuch eſtate as is ſpecified in a ſchedule thereunto annexed, and then the deviſor dyeth without annexing any ſchedule to the ſaid will, or other declaration of the certainty of the ſtate, this deviſe is void in law. Now it is to be conſidered, that albeit the intent of the deviſor be certain in all things, that nevertheleſſe ~~though~~ if it be unlawfull, the ſame will be of no force. And therefore, it is alſo needfull to diſcern, where and in what caſe the intent of the deviſor is unlawfull, and where not; and the intent of the deviſor is unlawfull, when it is ſo repugnant to the Rules of the Law, as that by any counſell learned in the Law, it could take no effect by Conveyance executed in his life time; as for example, a deviſe of a naked right, or poſſibility of a remainder to depend upon an eſtate in ~~the~~ fee ſimple thereby bequeathed, is ſaid to be unlawfull; for as no ſuch remainder

mainder could be bequeathed, *id eſt*, conveyed by any act executed in a mans life, ſo alſo no bare right could be conveyed by the like act executed in his life to any perſon, other than ſuch as were ſeiſed, or to be ſeiſed of the free-hold of the ſame lands at the inſtant of the execution of the conveyance, and that only by way of the extinguiſhment. And hereupon it followeth, that a man having right to lands deviſable, being by defeiſable Title in the poſſeſſion of *I. S.* cannot deviſe the ſame by will to *I. D.* So alſo the Lord, of whom the lands deviſable are immediately holden by Knights ſervice, cannot deviſe his poſſibility of Eſcheates or wardſhip, that may thereof accrew to him, when his Tenant ſhall happen to die without heires, or the poſſibility of wards, when the heirs ſhall be within age.

Concerning an intent impoſſible, we terme that an impoſſible intent, which by no probable and common poſſibility can be accompliſhed; and of ſuch impoſſible intents, there are three ſorts, 1. Impoſſible both at the time of the making of the will, and alſo at the death of the deviſor. 2. Impoſſible only

at

at the time of the deviſe, and not at the time of the deceaſe of the Teſtator. 3. Impoſſible at the time of the making of the deviſe. And as to firſt ſort of Lands deviſable by will, bequeathed to the heires of S. who was attainted of Felony or Treaſon, unreverſed at the time of the deviſe, or death of the deviſor: or if in time of Romiſh Religion, ſuch deviſe was made to one that was a Monk, being not deraigned at the time of the deviſe, or death of the Teſtator; or if the ſame be deviſed to the heires of *I. D.* who was then dead without heire; or to a Corporation that had no being at the time of the will, or death of the Teſtator; Or if a man by his will do deviſe a certain houſe in a Burrough, wherein at the time of his deviſe and death, he had nothing: Or if lands be deviſed to the executors of *I. S.* who died inteſtate, in every of theſe caſes, the intent of the deviſor was impoſſible, both at the time of the deviſe and death of the deviſor; and for ſuch impoſſibility, the deviſes are abſolutely void.

Concerning the ſecond ſort, if Lands were deviſed to a Monk, who at the time

me of the death of the teſtator was de-
igned, or to the heirs of one that is at-
inted of, &c. which is afterwards rever-
d before his death, or to a Corporation
at hath a being at the time of his death,
t not created at the time of the deviſe,
theſe caſes, the intent of the deviſor,
s onely impoſſible at the time of the
viſe, but not at the time of the deceaſe
the teſtator. And yet I take the Law,
t thoſe deviſes be alſo voyd, *nam quod initio non valet id tractu temporis non convaleſcit.*

The ſixth Obſervation is, that the de-
e be not countermanded; for it is a
ar caſe, that it is countermandable at
pleaſure of the Deviſor, or thereby
deviſe will be of no force in Law.
d it is to be noted, that there are two
ds of Countermands, the one is a
untermand in deed, the other a Coun-
mand in Law. A Countermand in
d, is when a Teſtator doth expreſly
oke his Will formerly made, or any
t thereof; and this Countermand by
d is of no leſſe force than if it were by
ting; for albeit, the Will contain,
ongſt other things, deviſes of Lands,
it in Writing, as an effectuall part
thereof,

thereof, in caſe where the cuſtome
law doth ſo require it; yet neverthele
an expreſſe countermand by word of
will, or of any deviſe of lands ther
compriſed, will be ſufficient in Law
controle the ſame, as it appeareth
Ketts caſe, 14 *El.* Alſo, if after the mak
of the Will, the Teſtator doth cauſe a
viſe therein made to one man to be q
ſtricken out; this is alſo a counterm
in deed of that deviſe, and the will ſta
deth good for all the reſidue. A cou
termand which in Law, is that whi
neither by Word nor Deed is expreſſe
but onely in thoſe other acts implyed.
for example, the making of another w
doth imply a revocation of the form
and therefore it is a countermand
Law thereof. So likewiſe if lands be
viſed by will, and afterwards the de
ſor infeoffeth a ſtranger in Fee there
this Feoffement doth imply a revocati
of the deviſe of the land, and therefore
is in that part a countermand in Law,
beit he afterwards repurchaſe the ſam
44 *Ed.* 3. 33. And although lands de
ſable by a cuſtome may be executed b
Writ of *ex grẽi. querela*, yet if there
no ſpeciall cuſtome to the contrary, t
devi

eviſee may (if he pleaſe) execute the
me by Entry, as it appeareth by 35
Aſſs. plit. 12. 40. *Aſſs. p.* 2. 27. *Aſſs. p.* 60.
nd in every ſuch caſe the poſſeſſion in
aw of the thing deviſed, is immediately
ter the deceaſe of the Teſtator, no leſſe
ſt upon the Deviſee, than it ſhould have
en-caſt upon the heir, if no deviſe had
en thereof made as appeareth *Brookes*
itle deviſe, 490.

Conveyances by Will, by force of the Statute of 32 & 34 *H.* 8.

ALthough Lands and Tenements, where in a man had any greater eate than for years, were not deviſable the Common Law; yet untill the aking of the Statute, 27 H. 8. cap. 10. *uſubus in poſſeſſionem transferendis*, men d commonly put their Lands in uſe; viz.) they did enfeoff others in Fee, the uſe of themſelves and their heirs, to e end that they might deviſe the ſame e, and by force thereof after the deceaſe the Teſtator, the Feoffees did at the queſt of ſuch deviſee, make and execute them an eſtate in the Land according

to

to the uſe deviſed, and if the Feoffe did refuſe ſo to do, the deviſee mig thereunto compell him by ſute in t *Chancery*. And ſo by ſuch ſubtill inve tion, the deviſe obteined the effect of deviſe of the ſame Lands or Tenement which were not then deviſable b Law.

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